

SHARED JURISDICTION IN THE EUROPEAN COMMUNITIES:
The Relationship of the Court of Justice of the
European Communities to National Courts of the
Member States in the Interpretation of Community
Law

by

Jerry L. Mashaw

Ph.D.
University of Edinburgh
1969



TABLE OF CONTENTS

	page
Abstract of Thesis	v
CHAPTER I. Introduction: An Approach to Community Jurisdiction Sharing	1
Terminological Ambiguity	5
Political Neutrality	14
The Variety of Jurisdictional Relationships	21
The Positive Value of "Shared Jurisdiction"	23
CHAPTER II. The Community Structure and Operation in General	25
I. Institutional Relationships	25
A. The ECSC Structure	26
1. The Assembly	27
2. The High Authority and the Council	29
a. The Interests Represented	31
b. Functional Relationship	36
B. The EEC Structure	39
C. The Combined Executives	52
II. The "Division of Competences"	53
A. The ECSC Approach	55
B. The EEC's Shift of Emphasis	57
Concluding Comments	68
CHAPTER III. A Court in a Community	70
The Court as Arbiter of the Jurisdiction-Sharing System	72
1. Institutional Control	75
2. Control of Member-State Action	77
3. EEC Modifications	78

Judicial Jurisdiction Sharing: The basic problem	80
CHAPTER IV. The Availability of a Community Hearing on Community Questions - The Importance of Shared Jurisdiction	88
Issues of Legality	89
A. Community Action	89
1. Under the ECSC Treaty	89
a. General Decisions	91
b. Individual Decisions	98
c. Recommendations	99
d. Special Activity	101
e. Control <u>d'opportunité</u>	102
2. Under the EEC Treaty	103
a. Appeal for Annulment	106
(1) Regulations	106
(2) Decisions	107
(a) Individual Concern	109
(b) Direct Concern	110
(3) Directives	115
b. Declaration of Illegality	117
c. Suit for Damages	121
3. Issues of Legality in the National Courts	130
B. Member State Action	135
1. Indirect Challenge Before the Court of Justice	136
a. The ECSC Procedures	136
b. EEC Problems	138

2. The Importance of Shared Jurisdiction	143
a. EEC Treaty, Article 177	144
b. ECSC Treaty, Article 41	157
Issues Not Involving Legality of Public Acts	158
Conclusions	163
CHAPTER V. The Opportunity to Interpret Community Law	167
I. The Documentary Criterion	167
A. The Possibility of Gaps in a Formal Sense	167
1. Texts Established Jointly by the Member States	168
2. Institutional Norm Creation	170
B. The Substantive Problem	173
1. Law National in Form	173
2. Law National in Content	188
II. National Court Initiative	190
A. Courts from Which Appeal Lies under National Law	191
B. Courts from Which No Appeal Lies under National Law	203
1. The Question of "Questions"	204
a. The Problem	204
b. An American Analogy	210
c. A Community Approach	217
2. Relevance	219
a. "Relevance" in the Court of Justice	220
b. National Court Treatment of Relevance	226

(1)	Irrelevance as a Function of a Particular Interpretation of Community Law	226
(2)	Irrelevance Based on the General Relationship Between Community and National Law	227
(3)	Irrelevance Based on Qualifi- cation of the Problem	234
(4)	Irrelevance Based on Lack of National Court Jurisdiction	236
(5)	Permissible Areas for the Appreciation of Relevance by National Courts	245
C.	Concluding Comments	248
CHAPTER VI.	The Technique of Judicial Juris- diction Sharing	252
I.	A Division of Function Based on Linguistic or Technical Criteria	253
A.	Interpretation - Application	253
B.	The <u>Bosch</u> -Opsahl Hypothesis	258
1.	Fact Determination	260
2.	Interpretation	265
3.	Subsumption	270
II.	The Flexible Approach	274
CHAPTER VII.	Concluding Comments: Frustration and Accomplishment	285
A.	National Courts and Community Law: The Establishment of Basic Principle	288
B.	Flexibility in the Exercise of Jurisdiction: The Question of Technique	289
	Bibliography	292

Abstract of Thesis

This thesis investigates the relationship between the Court of Justice of the European Communities and national courts of the member states of the European Community as interpreters of Community law. The principal thrust of the analysis is toward the development of an appreciation of the contextual factors which influence this relationship and which, it is argued, must form the basis for any evaluation of the legitimacy of the techniques of cooperation which are being developed by Community and national judiciaries.

Chapter I is concerned with an analysis of attempted general descriptions of the Community juridical structure. The finding is that traditional descriptive categories are of little value because of the particular political history of the European Communities and because of the variety of jurisdictional relationships established by the treaties involved. It is suggested that some new terminology which might avoid inappropriate political connotations and simplistic analogies be employed, herein, "shared jurisdiction."

Chapter II develops the content of Community jurisdiction sharing within the institutional order of the ECSC and EEC and as between Community and national institutional orders. The system described is relatively "untidy," but some general patterns emerge when the ECSC and EEC decisional processes and modes of implementation are compared.

Chapter III then outlines the position of the Court of Justice in the Community institutional order. In the

exercise of its numerous competences it is suggested that the Court is given the fundamental role of arbiter of the jurisdiction sharing system and that its position is in some important respects analogous to a court exercising a federal, constitutional jurisdiction.

The limitations of this federal constitutional control are explored in Chapter IV from the viewpoint of the availability of the Community Court forum for the resolution of various types of conflicts concerning Community law. The broad finding is that restrictions on the jurisdiction of the Court of Justice, particularly in respect of the EEC Treaty, necessarily result in the allocation of numerous Community law questions to national courts. This, coupled with the essentially normative rather than institutional impingement of the EEC on national legal orders, highlights the importance of judicial jurisdiction sharing under Article 177 of the EEC Treaty as a means for insuring the rule of law in the European Communities.

Chapter V examines the Article 177 jurisdiction from the perspective of the Community Court's opportunity to interpret Community law. Two major restrictions on such opportunities are found in the inability of the Court to consider certain norms which are either formally or substantively the result of "law generating" activity at the Community level and in the Treaty's failure to provide access to the Community forum save on the initiative of

national courts. These restrictions are analyzed in the context of the broader jurisdiction sharing system of which judicial jurisdiction sharing forms a part, and some suggestions are made concerning changes in present practice which are thought appropriate to the system in general.

In Chapter VI the functioning of judicial jurisdiction sharing is pursued through an analysis of the division of control between national courts and the Community Court over the various elements of decision making in cases where referrals are made by national courts under Article 177. The inevitable inaccuracies of attempts to describe this division of competences or "sharing" through categorical formulation of criteria are exposed and some examples are given which illustrate what is termed "the flexible approach." This latter approach is an attempt to take into account the various contextual factors influencing decision making and jurisdiction sharing in particular cases.

Chapter VII concludes the study with a brief and tentative evaluation of the present approach to judicial jurisdiction sharing under the EEC Treaty. The conclusion is that the present balance between firm principle and flexible technique seems, in broad terms, appropriate to the jurisdiction sharing system as a whole.

CHAPTER I. Introduction: An Approach to Community
Jurisdiction Sharing

This study has as its focal point the interpretive jurisdiction of the Court of Justice of the European Communities under Article 177 of the EEC Treaty. It began as a study of that one article and of the relationship created between the Court of Justice of the European Communities and Member State courts by its provision that:

"The Court of Justice shall be competent to make a preliminary decision concerning:

- (a) the interpretation of this Treaty;
- (b) the validity¹ and interpretation of acts of the institutions of the Community; and
- (c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

"Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

"Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such

¹ Although we shall have something to say about referrals of questions of validity, there is no extensive analysis of the special problems which may arise in such referrals. Our primary emphasis is on interpretation, and this is where the major jurisprudential developments have been.

court or tribunal shall refer the matter to the Court of Justice."²

Despite the author's desperate efforts, the study could not be kept within the confines of Article 177. That article is but one of the jurisdictional provisions relating to the competence of the Court of Justice. It fits into an overall pattern of jurisdiction and is explicable only in terms of that pattern.

Given this expansion, the development of the jurisprudence under Article 177 still resisted satisfactory analysis. The resolution of the problems presented by discreet invocations of the Community Court's jurisdiction under Article 177 has not necessarily been predicated on any basis which could readily be found in that article or through that article's place in the overall competence of the Court. Many of the problems which have arisen in this framework have raised additional issues of considerable magnitude.

For example, Article 177 provides for the referral from national courts to the Court of Justice of questions of the interpretation of the Treaty - a seemingly straightforward

² There are other jurisdictional provisions which might be thought to involve a renvoi a titre préjudicielle to the Court of Justice. Chevallier, Commentaire de l'article 177 du Traité C.E.E. a l'usage des juges et des justiciables français 6-12, Thèse, Paris, 1964 (polycopie), lists ECSC Treaty, Art. 65(4); Art. 16 of the ECSC Protocol on Privileges and Immunities, and Regulation 17 (EEC), Art. 9, para. 1.

The first and third of these provisions really involve review of a renvoi to the Community executive, and the second is not primarily a jurisdiction to rule on prejudicial questions, although it apparently could be so used.

provision. But what if (as has been the case) a particular Member State constitutional system considers the Treaty as incorporated (at whatever level) into national law, and the government of that state objects to the jurisdiction of the Community Court to hear referrals by its courts of questions of treaty interpretation on the ground that those questions involve national, not Community, law? The jurisdictional issue almost necessarily puts in question the basic nature of the Community system, or indeed whether there is a Community legal system distinct from Member State legal systems. This is a problem which is not soluble through textual exegesis. It can only be approached in the context of the general operation of the Community - its goals, its history, its decisional process, its methods of implementation.

Thus the scope of the study was necessarily expanded again to include an analysis of the relationship of Community and national law and of the general operation of the Community necessary to an evaluation of that relationship. At this point the data began to get out of hand, for it became increasingly clear that the general questions about which we have been talking were misdirected. There were no satisfactory, corresponding general answers.

The Community became like the elephant in the parable of the blind men, but multiplied to include several elephants and several score of blind men. Whether the Community is rigid like a tree or flexible like a snake or broad

as a wall depends on where you touch it. Nor does the gift of sight reduce the complexity. Generalization may be a virtue when it transforms legs, trunk and sides into an elephant. It is less than salutary when it necessarily chooses among varying interpretations of events, texts with divergent implications, and goals upon which there is no common agreement, in order to provide a general description of the Community system, of the relationship between Community and national law, and of the relationship between the Court of Justice and Member State courts under Article 177. Thus, in the hope of providing an analysis which is not too seriously misleading, it has been necessary to attempt to be broad in inquiry and yet specific in statement.

Of course, specificity can be extreme. Data must be structured to have meaning, and as the study progressed an internal structure emerged - a structure which is based more on a feeling for the relationships involved in the Community than on an attempt at a categorical formulation. It is this feel for the system that the author would like to convey by means of an approach which is hopefully general enough to avoid eclecticism, yet sufficiently specific to give some appreciation of the complexity of the relationships involved.

This general feel for the system came to be represented by the term "shared jurisdiction." It would be useful at this point to state what is meant by that concept in the form of a straightforward definition. Unfortunately, it is

impossible to do so. The development of the content of this terminology is the function of the whole study. However, it is possible to describe the considerations which have impelled the coining of this particular shorthand reference both to the relationship between Community and national courts under Article 177 and to the Community organizational scheme as a whole. Such a description will serve the additional purpose of exposing some of the background of Community developments.

Terminological Ambiguity

One of the virtues of developing a concept which has not been applied previously to specific institutional arrangements is its deliberate vagueness. A new term should have no confusing connotations of specific description in the absence of detailed analysis. We begin with a question rather than a conclusion, and even a cursory survey of the literature on the European Communities suggests that this is an important consideration.

One occasionally has visions of vast forests laid waste, of pulp mills putting on additional shifts, of a significant decrease in the level of unemployment in areas where paper-making is a major industry, all as a result of the rather unworldly occupation of jurists with the problem of analyzing, elucidating, classifying - above all classifying - the nature of European Communities. The project is endless because it is self-perpetuating. X's thesis can always be demolished

by Y's concrete example or Z's redefinition of terms, perhaps even by the resurrection of the ghost of A's argument that everyone thought dead these ten years. The forestry service is busy planting seedlings, and it is well advised to do so.

The problems involved in a juridical classification, even a juridical analysis, of the Community structure often seem insoluble. At best they require so many qualifications to the solutions proposed that exception and rule become confused. Nor is the exercise frivolous. People have to deal with these constructions, and they have a real desire and need not to find themselves communicating interminably at cross purposes.

The root of the trouble is both political and terminological. Where relationships are purposely vague, the jurist is at a disadvantage because he is accustomed to describing situations that are less politically fluid. The juridical translation of what facts can be pinned down is made difficult by de Tocqueville's sage conclusion that the mind of man more easily invents new things than new ideas, and we are constrained to employ a multitude of inadequate and improper expressions.

Terminological ambiguity is, then, hardly surprising, but it is made more acute, for one thing, by the inevitable attempt to describe the Community legal structure in relation to and by comparison with pre-existing structures, structures which are themselves not free from ambiguity.

Are the Communities international organizations?³ Of course, but what do we mean by that term? International organizations are formed for diverse purposes and in a wide variety of shapes and sizes. Moreover, the Communities combine structural features, competences and means of action rarely found in other international organizations, and then more often singly than in conjunction.⁴

This problem is sought to be overcome by invoking the term "supranational", a concept which has a longer history than the Community experiment,⁵ but of which the latter seems to be the only modern example, perhaps the only example ever.⁶

³ On the place of the European Communities in contemporary international legal thinking, see, e.g., Friedmann, *The Changing Structure of International Law* 113-14 (1964); Jenks, *The Common Law of Mankind* 218-20 (1958); Starke, *Introduction to International Law* 61, 119 (5th ed. 1963); de Valk, *La signification de l'intégration européenne pour le développement du droit international moderne* (1962).

⁴ See, Mathijsen, *Le droit de la Communauté Européenne du Charbon et de l'Acier: une étude des sources* 149-50 (1958).

⁵ Reuter, *International Institutions* 210 (transl. 1958) attributes its first use to H. Wehberg (*überstaatlich*) in his proposals for an International Prize Court, and to L. S. Woolf. It was intended to indicate not merely "coordination" but "subordination" of state action to an international control mechanism.

⁶ Zurcher, *The European Community - An Approach to Federal Integration*, in *Systems of Integrating the International Community* 71 (Plischke ed. 1964) cites the Swiss cantonal confederations and the Zollverein as supranational forerunners, but the similarities between these organizations and the European Communities cannot be pressed very far. See, Keeton, *The Zollverein and the Common Market*, 1963 *Cur. Leg. Prob.* 1. Moreover, Zurcher would classify the EEC and Euratom as something short of "supranational."

There is, alas, no agreement on what the acid test of supranationality might be,⁷ nor is its use officially sanctioned by the treaties except in relation to the High Authority of the Coal and Steel Community.

"Federal" is an oft-employed characterization, but it must be used with care. If by federal one means the particular balance of competences between two levels of government operating on the same territory and population characteristic of a federal state,⁸ the label is clearly not applicable. On the other hand, "federal" can be used in a more general sense - a sense which allows almost all social and political arrangements involving composite groups to be described as in some manner federal in structure.⁹ Moreover, federalism has both normative and institutional aspects.¹⁰ The standard federal organization might be thought to involve the concurrent application of two sets of laws or norms and the

7 Compare, e.g., Robertson, Legal Problems of European Integration, 91 Recueil des Cours 105, 143-48 (1957); Rosentiel, Reflections on the Notions of "Supranationality", 2 J. Common Market Studies 127 (1962); Schwarzenberger, Federalism and Supranationalism in the European Communities, 16 Cur. Leg. Prob. 17 (1963).

8 See, e.g., Wheare, Federal Government 13 (1953). Emphasis on a particular division of powers requires a denial of the "federal" status of the Community arrangements. See, e.g., Cardis, Fédéralisme et Integration Européenne 140-41 (1964).

9 See, e.g., Friedrich, International Federalism in Theory and Practice, in Systems of Integrating the International Community 120 (Plischke ed. 1964); Wiebringhaus, Le Droit Européen face au problème du statut des accords internationaux dans les structures fédératives, 1961 Rivista di Diritto europeo 367-86.

10 See generally, Scelle, Manuel de Droit International Public 251-360 (1948).

concurrent jurisdiction of two sets of institutional or governmental organs. An organization might, on the other hand, be only normatively federal, that is, it might evidence two sets of laws but only one level of governmental machinery. The converse situation would, of course, be pure institutional federalism. This distinction has some importance in relation to the Community situation which, in varying degrees, involves both normative and institutional federalism. Some of the more perplexing problems in the Community legal system may, indeed, be said to stem from an imbalance between normative and institutional aspects of the Community's peculiar federal structure.

It has also been said that the Communities' organization is a "constitutional" system¹¹ - not in the sense of a state constitution, but sufficiently analogous to allow one to talk about it as an advanced aspect of "international constitutional law" or more precisely "the constitutional law of international organizations."¹² This is a difficult

¹¹ Lagrange, *Les Problèmes Juridiques et Économiques du Marché Commun* 43 (1960); Bebr, *The Relationship of European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis*, 58 Colum. L. Rev. 767, 788 (1958); Speech by M. Battaglia in the European Parliament, 17 June 1965, No. 79 Debats IX/65, p. 231.

Some writers occasionally get a bit carried away and begin speaking of the "sovereignty" of the Communities and of the task of international constitutional law as the "subordination" of state law. *E.g.*, de Valk, *op. cit. supra* note 3, at 100, 118.

¹² See, Opsahl, *An "International Constitutional Law"?*, 10 Int'l & Comp. L. Q. 760 (1961). ("International constitutional law" will not here be employed in the more general sense of the "basic organizing norms of international society." For our purposes some institutional structure, beyond state governmental agencies performing "double functions", is presumed.)

concept because it requires a delicate balancing act between thinking of constitutional law in this context as simply the structural norms of an international organization and, on the other hand, emphasizing nation-state constitutional characteristics, such as the ubiquitous Kompetenz-Kompetenz. In the former case international, constitutional law becomes inseparable from the law of international organizations, while in the latter one is bound to conclude that no international organization really fits the definition.

But let us not readily abandon this idea of the Communities as a constitutional system, for an attempt to describe the Communities "constitutionally" seems to be at the base of the whole terminological problem. The delimitation of the province of a constitutional law of international organizations may indicate the approach which must be taken toward a juridical description of the Community structure.

There is, of course, some problem in defining constitutional law at the national level.¹³ Formal definitions based on the existence of a constituent document fail to cover certain rather obvious situations, but a substantive approach also tends to cause difficulties, e.g., in making distinctions between constitutional and administrative law.¹⁴ Even

¹³ A discussion of the evolution of ideas about the nature of constitutional law appears in McIlwain, *Constitutionalism* (Great Seal ed. 1958).

¹⁴ There seems no means by which administrative law can be defined except formally by reference to an existing institutional structure admitted to be "administrative." See, e.g., Jaffe, *Administrative Law* 1 (1954).

so, the substantive approach seems the lesser evil, and national constitutional rules might be thought of as those legal norms which are concerned with the extent and distributions of state power among governmental organs and with the relationship of the exercise of that power to individual rights and duties.¹⁵

Purged of the idea of "state," and perhaps "governmental" to the extent that it is a derivative concept, this definition can serve as the point of departure for a determination of what the "constitutional law of international organizations" in general, and of the European Communities in particular, might be about. The significant aspect of the definition is that it emphasizes the concern of constitutional law with, not only the organization and distribution of power, but also the relationship of its distribution and exercise to the legal status of persons within its jurisdiction. As applied to international organizations this "constitutional" perspective can provide the ground for distinguishing between the "constitutional law of international organizations" and simply the "law of international organizations," for the latter may be concerned only with internal institutional and administrative structures and with the relationships of organizations with their employees.

¹⁵ See, e.g., the description of the province of constitutional law in Mitchell, *Constitutional Law* 2 (1964).

A constitutional law analysis of an international organization must ask how the international structure organizes the society subject to it: What interests are represented in the institutional order; how are they represented; what power or influence is guaranteed them and in relation to what types of decisions? In what form are decisions taken; to what extent do they affect the legal relationships of persons within the institution's jurisdiction and by what procedural means? What basic values must be respected in the decision-making process?

This constitutional approach can be applied to any international organization. The question is not whether international organizations affect individuals, but in what way the latter are affected. Of course, the fewer direct contacts between the organization and individuals within its area of jurisdiction the more difficulty there is in relating structural arrangements, decision-making processes and institutional values to the rights and duties of private legal persons. The particular international society is then less well organized and is of less interest from the standpoint of constitutional analysis.

The European Communities are particularly interesting from the constitutional viewpoint because of the number and variety of both direct and indirect relationships of private legal persons to the international, decision-making structure.

Writers have begun to talk in terms of a new constitutional status, the status of being an "European."¹⁶ However, clearly this status is ultimately determined by an exercise of collective, or state, rather than individual competence. Individuals cannot "join" the Community independently. We are still dealing with an international structure. In the more concrete terminology of the social scientist, what is of interest is the extent and manner in which the primary social group, the state, allows participation by its members in a wider group whose common interests may not always coincide with the primary-group interest, notwithstanding the locus of ultimate power to determine status.¹⁷ The constitutional law analysis of an international organization must investigate the nature, mode and scope of such participation which, in effect, is to describe the institutional and jurisdictional structure of the organization and how its operation affects and is affected by the primary group's structure and competence.

To put it another way, the ultimately derivative quality of individual membership in a given international or transnational group is a function of the basic fact that international organizations and their Member States must share both

¹⁶ See, e.g., de Valk, op. cit. supra note 3, at 83-94; Duclaux, L'Européen: Exploration d'une catégorie juridique naissante, 1961 R.G.D.I.P. 260-300.

¹⁷ See discussion of international institutionalism in social terms in Reuter, op. cit. supra note 5.

territories and populations. This convergence of operational spheres produces, depending upon the peculiar arrangements involved, a certain tension, a certain balance, between international and state power and influence. In order to investigate the relationship of individuals to an international institutional structure and to analyze the exercise of power at the international organizational level, international constitutional law must include within its analysis the relationship of the given international organization to its Member States - the "federal balance" of the system. It must ask, in the particular circumstances of that international organization, how it and its members share their jurisdictions.

It seems, then, that to speak about the European Communities as a constitutional system is necessarily to combine all the ambiguous terminology and to speak in terms of an "international, federal, constitutional system." It is to say no more than that the Communities' juridical structure is based on particular instances of and procedures for jurisdiction sharing. Our thinking had best not be cluttered with labels derived from different contexts until a fairly specific analysis of Community organization will allow us to put them in their proper perspective.

Political Neutrality

The terminological problems involved in classifying the Community structure have more than academic significance. A choice among "federal," "supranational," or "international"

by persons involved in the integrative process often implies a difference in the speaker's degree of political commitment to the integration of Europe and gives a key to his ideas about the purposes of the institutional order constructed. The inability of commentators consistently to apply a well-understood juridical concept to the Community reflects the Community's foundation in diverse interests and purposes.

There were, of course, common ideas, aims, problems and experiences at the base of the Community development.¹⁸ It built on two, more general, post-war European ideas: (1) the desirability of institutionalized political collaboration to express views formulated in a common European framework and to thereby avoid nationalistic fragmentation of sentiment allowing belligerent action, and (2) the necessity of economic cooperation on a continental scale in order to permit a rationalized expansion and a general raising of living standards. The Schuman Plan carried forward the first idea by proposing the creation of an independent executive and the neutralization of the "arsenal of Europe" and by making the proposal clearly a first step toward a firmer and more general union. In the economic sphere the common market in coal and steel moved beyond the idea of "cooperation" to that of

¹⁸ There are numerous general works on the history, politics and economics of European integration. Some of the more readable include: Camps, Britain and the European Community: 1955-1963 (1964); Diebold, The Schuman Plan (1959); Haas, The Uniting of Europe (1958); Reuter, La Communauté Européenne du Charbon et de l'Acier (1953); Robertson, European Institutions (1959); Schmitt, The Path to European Union (1962).

"integration."¹⁹ Nor were the political and economic considerations wholly distinct; they were recognized to be mutually reinforcing.²⁰

Moreover, the simple fact that six countries joined the ECSC, and later the Common Market and **EURATOM**, indicated that they, or at least the persons and groups within them who had effective power to influence policy, took these ideas about political and economic integration more seriously than those who were within the broader European developments in the Council of Europe and O.E.E.C., but who opted out of the Community experiment.²¹ This concrete expression of political will by the six had common roots in similar wartime experience and loss of faith in national institutions. Perhaps also of some influence were very old ideas about "natural unity" and a common cultural heritage.²²

The construction of the European Communities can indeed be viewed as a reaction, springing from common experience, against both nationalism and the classical and looser forms of international association connected with it. But this is a very partial picture of the economic and political considerations involved. M. Schuman's Plan was "European," but it

¹⁹ See Robertson, *European Institutions* xiii (1959).

²⁰ Reuter, *op. cit. supra* note 18, at 30-31.

²¹ See generally, Benoit, *Europe at Sixes and Sevens* (1961); Camps, *The Free Trade Area Negotiations*, P.E.P. Occasional Paper No. 2, 6 April 1959.

²² Northrop, *European Union and United States Foreign Policy* 111-37 (1954); Schuman, *Pour L'Europe* 117 (1963).

also satisfied an urgent need to reorient a national foreign policy that was increasingly unsuccessful. The Germans, or at least Adenauer and his associates, were "supranationally"-minded from a determination to avoid a resurgence of nationalism, but the ECSC was also the most attractive method of obtaining the removal of allied controls. The Dutch were completing their retreat from Empire and their economic interest was turning inevitably back to Europe. If long-term Belgian mining problems were to be solved, the ECSC might provide a means of cushioning the shock and of obtaining assistance in the transition.

The prevalence of attitudes based on particular interests was even more pronounced within the nation states concerned. After an exhaustive analysis of national and pressure group positions, Ernst Haas has concluded that the acceptance of ECSC is best explained in terms of "the convergence of demands within and among the nations concerned, not by a pattern of identical demands and hopes."²³ Italian participants in the formation of the Community, to take one national example, could have been and were actuated by motives ranging from a strong ideological commitment to a United States of Europe to concern about the serious excess in the national labor force. The negotiation of the ECSC Treaty was, then, not a conference of wholly like-minded delegates bent on

²³ Haas, *The Uniting of Europe* 286 (1958).

carrying their common aim through to its logical conclusion.²⁴ The Treaty which emerged is a document full of ingenious compromise, hammered out over months of negotiation in order to harmonize competing interests with fundamental aims.²⁵ That the structure thus erected is juridically elusive is not surprising.

But ambiguity and variety of political purpose does not end with the Coal and Steel Community. The history of the formulation of the European Economic Community Treaty evidences the same variables, but with a slightly different mix. By the time the EEC Treaty was drafted, the post-war political situation had changed substantially. The ideological commitment to Europe had received a body blow in the failure of the Defense and Political Communities. Governments tended to take a rather sterner look at their possibilities for controlling the regulatory structure of the new Community, whatever logic²⁶ dictated about the necessity for

²⁴ The techniques of drafting used in the Committee stages did keep political wrangling to a minimum. Schuman, op. cit. supra note 22, at 164-72.

²⁵ There is still animated debate over whether the Treaty contains a coherent economic policy. See discussion in *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* 13-46 (1965).

²⁶ The logical connection between economic integration and the political structure for its control is a recurring theme in the Community development. See, e.g., Hallstein, Economic Integration and Political Unity in Europe, Community Topics No. 2 (1961); Schuman, op. cit. supra note 22, at 145-50; Spaak, Speech in Council of Europe, Consultative Assembly, 21 October 1955, 111 Official Report of Debates 617 (1955); Commission of the EEC, Third Annual Report 15-19 (1960).

its independence. Some of the compelling ideological reasons for submerging national policy in a broader framework had disappeared. At this juncture, the economic content of the movement seems to have far outweighed the overtly political.

On the other hand, the years of association in the ECSC had proved the system workable and had built up a kind of esprit among the participants.²⁷ National interest groups had begun to identify with the "supranational" enterprise and to band together to seek to influence its operation. Many who had predicted gloom, doom and failure at the inception of the ECSC now favored a general common market. Nor was the ideological content of the general "European movement" really a dead letter. It was only thought that, considering past failures, the overtly political had better be dropped in favor of a pursuit of political ends by economic means.²⁸

This almost systematic confusion of purposes is perhaps the most characteristic element of the "relance Européen"

²⁷ Haas, op. cit. supra note 23, at 514-20, claims that this substantially affected the negotiation of the Rome Treaties. Contra, Cartou, Le Marché Commun et le Droit Public 4 (1959).

²⁸ See, e.g., Joint Declaration, Action Committee for the United States of Europe, 11th Session, Bonn, June 1, 1964.

There is earlier European experience, particularly in Germany, which tends to demonstrate the impetus of economic integration toward political union. Fisher, 3 History of Europe 930, 963 (1935); Henderson, The Genesis of the Common Market 89-113 (1962).

which culminated in the EEC and EURATOM treaties. Particular interests had shifted during the years 1952-1957, but not necessarily toward a more unified view of the common objective. The Common Market Treaty was still constructed on a pluralistic base. Again there was hard bargaining, compromise, the erection of a "coherent patchwork" that defies simple description.

Moreover, it is a patchwork that is expected to develop. The Common Market Treaty is much more a "framework law" than is the ECSC Treaty. It requires filling in by the Community institutions. These institutions are placed in a particular working relationship with each other, but a relationship which is subject to informal development and evolution, and in some cases to treaty-based alteration over the transitional period. The continual process of interest identification as the Community moves into the various subject-areas of its competence²⁹ could progressively alter the political base of

²⁹ As some progress was made in the agricultural field, for example, about 100 transnational pressure groups developed which seek to influence Community policy in the direction of common interest. Lindberg, Decision Making and Integration in the European Community, XIX Int'l Org. 56 (1956). The 1962-63 Yearbook of International Organizations listed some 216 non-governmental organizations operating on a Community-wide basis. They ranged from the Committee of Hop Planters of the Common Market to the European Union of Chambers of Commerce for the Common Market.

An interesting case study of evolution of interest identification is provided by the influential Conseil National du Patronat Français. In 1952 the Patronat predicted doom, in 1957 Haas lists them as having negative short-term expectations, but in 1965 the association publicly deplored General DeGaulle's attitude toward the EEC. See, Business Week, July 10, 1965, p. 32.

the structure,³⁰ and hence the patterns of behavior within it. The Community institutions and activities thus become the battleground for the diverse interests which entered into their formation and for the competing views of what the organization's general purpose was meant to be.

The juridical generalization written in these shifting sands is either meaningless or soon erased. Hence, we begin by saying only that Community institutions and national governments are cast by the Treaties into a relationship whereby they share substantive jurisdictions. To say that such jurisdiction sharing takes place is not to take sides between those who view economic integration as preparing the ground for and contributing to greater political integration and those who see the political aspects of the Communities as only necessary and burdensome evils for the realization of economic ends.

The Variety of Jurisdictional Relationships

As might be deduced from the preceding discussion, the plurality of substantive interests involved in the formulation of the ECSC and EEC Treaties did not result in the creation of clear patterns of institutional and Member State competence in either Community. The "division of competences," if that

³⁰ This process is sometimes directly fostered by governments, for example, through changes in school curricula. See High Authority's Fifth General Report (1957).

phrase may properly be used, in any specific instance depends not only on which treaty and Community institutions are involved, but also on which area of economic activity (industry, transport, agriculture, etc.) is being affected and/or on the type of economic tool (tariff policy, price fixing, monetary policy, subsidy, etc.) employed.

"Shared jurisdiction" is used to cover the multifarious range of jurisdictional relationships within the Community system, because the uniqueness and complexity of Community arrangements will not conform to standard categories. In this context most, or perhaps any, of the traditional verbal tools of legal analysis break down. In discussing federal systems, for example, we are accustomed to distinguish between "separation of powers" and "division of powers" problems.³¹ In the Community structure elements of both ideas are so fused that an analysis of the division of competences in the Community based on these traditional categories would be difficult if not impossible.

Nor do standard categories fit the jurisdictional relationship of Community and national courts under Article 177

³¹ This nomenclature is employed in federal-state systems to distinguish between the constitutional aspects of institutional balance at the national level, a la Montesquieu, and the problems of national government-regional government relations. There is usually some overlap, but the federal aspects of the separation of powers, such as the inclusion of a House of States or Senate in the legislative scheme, are minimized if not nullified in a federal-state arrangement by the majority-voting rule. Kelsen, *Law and Peace* 126-44 (1942).

with any greater facility. The relationship is not that of an appellate court and inferior tribunals. Neither is it that of courts exercising concurrent powers, nor of courts invested with separate, exclusive jurisdictions. Rather, Article 177 provides for a somewhat more subtle "sharing" of the power of decision between the Court of Justice and a national court.

The Positive Value of "Shared Jurisdiction"

Although by this point it may be difficult to believe, the "shared jurisdiction" terminology has not been developed merely as a means of avoiding the politically charged and technically inaccurate connotations of existing categories. To the extent that a shorthand reference to Community relationships is necessary, and we can hardly do without some general concept, the use of "sharing" in conjunction with "jurisdiction" has been thought peculiarly appropriate to the facts of Community life. "Jurisdiction" in its broadest sense conveys the idea of a legally-defined scope of operation, including aspects of territoriality, subject-matter competence and mode of action. "Sharing" adds to this idea of legally-defined competence connotations of flexibility and cooperative action which in the European Communities are essential ingredients for successful operation.

Nor should the use of "jurisdiction sharing" or "shared jurisdiction" in a double sense - as descriptive both of overall Community-Member State relationships and of particular aspects of the allocation of judicial jurisdiction between

Community and national courts - be confusing when put into context. This studied double entendre helps to emphasize a recurrent theme, the connection between shared judicial jurisdiction and the jurisdiction sharing pattern of the Communities as a whole. The evaluation of the former necessarily rests on an appreciation of the latter.

CHAPTER II. The Community Structure and Operation in General

The sharing of general spheres of operation between the Community institutional order and Member State governments in terms of territory and population, of course, gives rise to the necessity of further jurisdictional arrangements. These further arrangements may be broken down into two general categories: (1) jurisdiction sharing within the Community institutional order and (2) jurisdiction sharing with respect to the accomplishment of particular substantive aims.

I. Institutional Relationships

Within this category it is presumed that decision-makers at the Community level have jurisdiction to act in specified ways in relation to whatever subject is envisaged. But to say that Community rather than Member State organs are competent to take certain action is not to say very much. As was mentioned previously, we cannot here easily distinguish between "separation of powers" and "division of powers" problems.¹ There is a significant sharing of influence and power between organs representing independent Community interests and those representing Member-State interests within the Community institutional structure, in addition to the aspects of jurisdiction sharing to be found by examining the relationships between Member-State and Community institutional machinery in connection with the accomplishment of specified ends.

¹ Reuter, Juridical and Institutional Aspects of the European Regional Communities, 26 Law & Contemp. Prob. 381, 382 (1961).

A. The ECSC Structure

The original Schuman proposal explicitly envisaged only one Community organ, an independent or "supranational" High Authority with direct powers of decision over the coal and steel sector. (The unified Commission under the Merger Treaty now exercises the competence allocated to the High Authority in the ECSC Treaty.²) The other institutions were developed primarily in an effort to fashion safeguards against irresponsible, unwise or illegal executive action.³ Institutional safeguards were, indeed, necessary because the usual method of international institutional control, by state representation and veto powers in the primary decision-making organ, had been abandoned. The High Authority was thus made politically responsible to an Assembly, legally accountable before a Court of Justice, and subject to varying degrees of control through the working relationship created between it and the Special Council of Ministers. Some areas of its activity were also made subject to consultation with a Consultative Committee, appointed by the Council and composed of representatives of producers, workers, consumers and dealers.⁴ However, the relationships between these

² See infra, notes 69-71 and accompanying text.

³ The best discussion of the institutional history is in Reuter, *Communauté Européenne du Charbon et de l'Acier* (1953).

⁴ This organ seems to have had little real influence, probably because membership in it is necessarily on a part-time and amateur basis. See, Schmitt, *The Path to European Union* 116-125 (1962). Contra, Lagrange, *Le pouvoir de décision dans les Communautés européennes*, 3 *Rev. Trim. Dr. Eur.* 1, 12 (1967).

institutions are more complex than simply the performance of initiative, decisional, and checking functions. (The Court is left out of account here because it will receive a separate treatment in the following chapter.)

1. The Assembly

The desire for a political check on the executive was fundamental to the Assembly's inclusion in the institutional order. "Technocracy" - one of the principal powers of darkness in modern political mythology - in the form of the High Authority wanted controlling by some more democratic institution.⁵ The Assembly's political control, as provided by the ECSC Treaty, consisted primarily of a power to turn the High Authority out of office by a vote of censure on its annual report. This was in effect to paralyze the Assembly with power - rather like having the hydrogen bomb and no ground troops. The Assembly fulfills its checking role more effectively through a pattern of continuous consultations, far in excess of that required by the Treaty, that has built up between its committees and the High Authority and through the separate examination and

⁵ This was felt even though the High Authority, which could be expected to take account of the general interest, has a basically democratic character when compared with the traditional system of cartels in the European coal and steel market which it replaces.

Interestingly enough, there was a fragmentation of German opinion between those wanting greater democratic safeguards in the structure and those who thought that losing the power German production had given German firms in the old cartels was too democratic to begin with. Diebold, op. cit. supra Chapter II, note 18, at 99.

criticism by these committees of the various parts of the executive's annual reports. Through the creation of its own expertise, the Assembly then puts itself in the position to be a positive force in the shaping of Community policy. Indeed, building on the Hague Congress ideals and the Council of Europe experience, the positive role that the Assembly might play in exposing progressive "European" sentiment was an important additional consideration for the inclusion of a "parliamentary" organ in the structure. In practice it is this sort of political activity that has been the most striking aspect of the Assembly's operation.⁶ Any element of national influence that might have been built into the organ by the appointment of its members by national parliaments⁷ has virtually been nullified by the Assembly's decision to organize itself along party rather than national lines.

These developments have combined with a generally pro-Community bias, produced by national selection procedures which have largely excluded anti-Community elements, to create an extremely progressive body - a body which tends to support the independent executive in its confrontation

⁶ See, e.g., Parlement Européen, Séance du Mercredi, 24 Mars 1965, v/65 Débats No. 77, p. 187. (Resolution on problems of European political unity).

(This is, of course, a fairly recent example, but the basic character of the Assembly's attitude has not changed with its broadening to include the two "Rome" structures.)

⁷ This situation is expected to give way at some time to election by direct universal suffrage. ECSC Treaty, Art. 21 (3); EEC Treaty, Art. 138 (3).

with national interests and which adds to the Community-oriented share of influence within the institutional order, notwithstanding (perhaps, because of) its negligible share of the Community's power to take binding decisions.⁸ For example, the Assembly called for stronger and more determined action by the High Authority and criticized the Authority's attempts to accommodate national interests where such practices retarded authorized, independent action by the Community executive.⁹

2. The High Authority and the Council

The crucial sharing of jurisdiction within the institutional structure of the ECSC is, of course, between the High Authority and the Council (now "the Commission" and "the Council" under the Merger Treaty). "Sharing" here covers at least four different types of arrangements: (1) Both organs have certain powers that are exercised entirely independently of the other. The Council's powers to act independently of the High Authority seem to fall within three broad categories, internal administration and appointments,¹⁰ cases where the Authority has failed to

⁸ See generally, Heidelberg, Parliamentary Control and Political Groups in the Three European Regional Communities, 26 L. & Contemp. Probs. 430 (1961).

⁹ *Parlement Européen, Rapport sur le onzième rapport general sur l'activité de la Communauté Européenne du Charbon et de l'acier* 36 (June 18, 1963).

¹⁰ ECSC Treaty, Arts. 9 para. 2, 29, 32 para. 4, 78 (6). (Note that some of the Council's "independent" powers are exercised at the initiative of a Member State government or a Community organ other than the High Authority.)

act,¹¹ and additions to the subject-matter competence of the Community or to Community membership.¹² The High Authority, on the other hand, has independent powers of action either of a normative or a penal nature, often both, in relation to nearly all the substantive areas of the Community's operation.¹³ (2) In addition, the independent executive has numerous competences which are subject only to the "consultation" of the Council.¹⁴ (3) A third and extensive category of jurisdiction sharing involves instances where the High Authority has both initiative and decision-making powers but can act only with the "agreement," "confirmation," or "authorization" of the Council or in the absence of the latter's unanimous negative vote.¹⁵ This category includes a number of important and sensitive matters, e.g., taxation, direct intervention in the market, and action beyond the powers specifically granted in the Treaty. (4) Finally, there are a few cases where the exercise of jurisdiction in

11 ECSC Treaty, Art. 59 (5) and (6).

12 ECSC Treaty, Arts. 81 para. 2, 98.

13 ECSC Treaty, Arts. 47 para. 1 & 3, 50 (2) & (3), 51, 54, 59 (3), 60 (2)(a), 65 (3) & (5), 68 (2), 70 para. 4, 74, 88 para. 1, 91.

14 E.g., ECSC Treaty, Arts. 37 (2), 50 (2), 51 (1), 53 (a), 59 (6), 60 (1), 61 para. 1, 62, 66 (1) & (4), 67 (2) & (3), 68 (5), 73.

15 E.g., ECSC Treaty, Arts. 50 (2), 53 (b), 54 para. 2, 55 (2)(c), 56, 58 (1) & (3), 59 (1) & (5), 66 (3), 68 (5), 74 last para., 88 para. 3, 95.

a particular instance is joint, either on the basis of a division of initiative and decision-making power,¹⁶ or because of a coordinate division of power to control different aspects of the same exercise of Community competence.¹⁷

These jurisdiction-sharing schemes are complex enough in themselves, but in order to perceive how they contribute to a sharing of control within the institutional structure between organs representing Community interests on the one hand and Member-State interests on the other, additional considerations must be taken into account. We must ask to what extent the composition and decision-making procedures within the High Authority and the Council make them repositories of the Community interest and national interests respectively, and also what the functional relationship of the two institutions has been in practice.

a. The Interests Represented

There seems little reason to doubt that the High Authority conformed to the independent character guaranteed it by the Treaty. Some problems arose in relation to the choice of members by national governments and

¹⁶ E.g., ECSC Treaty, Arts. 59 (2), 61 last para., 72 para. 1, 95 para. 4, 96.

¹⁷ See ECSC Treaty, Art. 56 last para. (This provision is the only one of its type that the writer has discovered in the Treaty. It may have been intended as a category (3) type situation, but the wording indicates that the High Authority and Council are expected to take separate decisions, each of which directly regulates the concrete instance involved.)

the distribution of membership "mysteriously" conformed to the degree of importance of the Member-State coal and steel industries,¹⁸ but no one suggests that the members of the Authority acted in accordance with considerations other than that of the Community interest with which they were charged. (Moreover, the selection procedures were designed ultimately to produce an executive whose majority would vacillate biennially between co-opted members and those appointed by the member governments.¹⁹

The interest represented by the Council is more elusive. Voting in the Council is based on two general systems: (1) Where the Council is called upon to "agree" to High Authority action, an affirmative decision requires an absolute majority including the vote of a state representing at least 1/6 of the total coal and steel production of the Community or, failing four affirmative votes and in the event that the High Authority persists in its attitude, three affirmative votes with the same production qualification.²⁰ These general rules are subject to specific exceptions.²¹ (2) Other action is taken generally on the

¹⁸ See, Ljubisavljevic, *Les problèmes de la pondération dans les institutions européennes*, 100-103 (1959) (who also points out that this same sort of "weighting" has occurred in the Consultative Committee).

¹⁹ ECSC Treaty, Art. 10.

²⁰ ECSC Treaty, Art. 28.

²¹ ECSC Treaty, Arts. 58 (3) (agreement unless unanimous negative vote), 53(b) (agreement must be unanimous), 88 (approval by 2/3 vote).

basis of an absolute majority including the vote of a Member State representing a $1/6$ share of production,²² or in respect of certain provisions by means of a $2/3$,²³ $5/6$ ²⁴ or unanimous vote.²⁵

The absolute, or simple, majority is always qualified by the $1/6$ of production proviso, a procedure designed to prevent action in the face of joint Franco-German objections.²⁶ Oddly enough this makes a simple majority in a six-member Community more difficult to obtain than the $2/3$ majority, which presumably was included as an additional safeguard to state interests. At any rate we might conclude on the basis of the formal voting procedures that a Council decision represents state interests in different ways depending upon the topic under discussion, but generally a collective rather than an individual state interest. Included within this collective state interest might be any number of elements, e.g., respect for basic treaty purposes, concessions to domestic problems of various states, appreciation of changed economic conditions, considerations of

22 ECSC Treaty, Art. 28.

23 ECSC Treaty, Art. 96 (calling conference to amend treaty).

24 ECSC Treaty, Art. 10 (appointing High Authority).

25 ECSC Treaty, Arts. 58 (1) para. 1, 59 (2) para. 1 and 59 (6) para. 2 (instituting production control or consumption priorities).

26 The retention of this Franco-German prerogative was considered important enough to require a para-legal modification of the percentage from $1/5$ to $1/6$ on the accession of the Saar to Germany in the Franco-German Treaty of 27 October 1956.

technical feasibility, and the weight given any particular element can be expected to shift from issue to issue. It would appear that the Council can further the interests of a particular Member State, as opposed to the interests of the majority or the collective interest, only in the few instances where voting procedures allow a veto.

There is operational evidence that "collective state interest" is reasonably descriptive of the interest represented by the Council, but that it does not result from the use of the Treaty's voting procedures.²⁷ In practice the Council rarely decides other than by unanimity. At this stage of Community developments, rigorous use of majority voting is politically dangerous. However, the reliance on unanimity is not necessarily a means of weakening the Community by re-introducing national vetoes. It is a reasonable attempt to accommodate all the national interests involved wherever possible and to arrive at common solutions. Over time the participants in this decisional process begin to take a broader perspective, to look at problems as common ones, to become "systems oriented," or in Haas's terms to negotiate in the "Community spirit." The question then becomes whether this process transforms the Council into an organ representing the Community interest, such that "collective state interest" and "Community interest" are synonymous.

²⁷ See the discussion of Council functioning in Haas, op. cit. supra Chapter I, note 23.

If it does, talk of jurisdiction-sharing within the institutional order is otiose.

This can hardly be said to be the case. For one thing the High Authority, whose policies must be taken as the incarnation of the Community interest, makes independent decisions arrived at within the framework of and based on its mandate under the relevant Treaty provisions. The interest thus represented on a particular issue need not coincide with the "collective state interest" developed through the Council procedures above described. That it should often do so, considering the variables involved, seems improbable.

Secondly, the "Community spirit" of negotiation, built as it is on mutual confidence and cooperation, is a fragile construction. When national interests are sufficiently strong, there is an inevitable reversion to particular, national viewpoints. If unanimity is to be preserved, this may require the swapping of state A's position on topic X for state B's position on topic Y. In this manner the "collective state interest" represented by a Council decision may in reality be a patchwork of particular state interests. In this process the Community interest, that is its stated goal with respect to X or Y, can become a secondary if not an irrelevant consideration. The reversion to national attitudes in one situation may be expected to carry over into the whole pattern of decision-making until confidence is restored.

We are then, when speaking of the High Authority and the Council, dealing with organs whose jurisdiction-sharing relationships are relevant to the general problem of how jurisdiction is shared between the Community and its Member States. But we still must ask how the operational practices of these institutions influence the jurisdictional balance between Community and Member State interests as established by the Treaty.

b. Functional Relationships

As has been said, the primary activity of the Coal and Steel Community is supposed to be carried on by the independent executive. In general the High Authority's tasks are to be carried out (1) on the basis of independent action or action taken after non-binding consultation with the Council or (2) through decisions taken with the agreement of the latter. However, it would appear that in both cases the effective power of decision has tended to shift from the High Authority to the Council.

It is clear that, in relation to the first procedural category, the High Authority has not acted as independently of the Council, and hence of Member-State interests, as it was designed to act. Consistent with its practice of close collaboration with all parties interested in particular, proposed action, the High Authority has consulted the Council in instances where it need not have. Such consultation is specifically provided for in Article 26 of the Treaty, but the Authority has tended to treat

"consultations" in the same manner as situations requiring agreement and in this regard has provoked criticism by the Assembly.

The Council's role in the second category of instances was meant to be important. Numerous decisions which significantly affect Member-State economies and in respect of which the Treaty gives only very general guidance may be taken by the High Authority.²⁸ State interests required not only consultation but an effective power to block undesirable action. However, one suspects that those interested in a strong Community executive must have thought that the High Authority's initiative power and expertise would give it a preponderant position in its relations with the Council. This did not occur, at least in part because under the ECSC Treaty the Council also organized itself on a permanent basis through its Coordinating Committee.²⁹ This meant that the Council was in a position to offer detailed alternatives to High Authority proposals, alternatives which the latter had to take into account if it was to

²⁸ See, e.g., ECSC Treaty Art. 53. This is not, however, to say that the provisions requiring "agreement" are all based on these considerations. It is impossible in many instances to discern why the High Authority-Council relationship is based on agreement rather than consultation or vice versa.

²⁹ Query what sort of orientation these permanent officials acquire?

On the development of Council-High Authority consultation and the creation of "CoCor" see, Lagrange, *Le pouvoir de decision dans les Communautés européennes*, 3 Rev. Trim. Dr. Eur. 1, 14-16 (1967).

obtain Council approval. High Authority Annual Reports, particularly from 1959 until its replacement by the unified Commission, revealed increasing difficulty in getting the independent executive's proposals through the Council, as well as an increasing need for Community action in areas where Council approval or special Council action was required.³⁰

This last consideration may be the key to the development of the importance of the Council in the ECSC scheme and to the apparent hesitancy of the High Authority to exercise its full powers. The specific powers provided by the Treaty permit the regulation of a market whose principal difficulty is shortage. Yet very soon after the Treaty went into effect the problem became, and has remained, surplus. As a result the High Authority had to rely significantly on those Treaty articles which permit the formation of new policy with the Council's approval. The urgent necessity to get approval in some areas must be expected to have affected the degree of independence that could wisely be exercised in others.³¹

³⁰ The High Authority felt called upon periodically to justify its relationship to the Council by reference to the changed conditions of the coal and steel market. See, e.g., "Europe's Coal and Steel Situation Reversed Since 1951," 102 European Community 19 (Apr.-May 1967).

³¹ See Olivier, *Aspects Juridiques de l'adaptation du Traité C.E.C.A. à la Crise Charbonnière*, 1967 *Cahiers de droit européen* 163, 173.

B. The EEC Structure

It has often been said that the Common Market Treaty codified the operational relationships developed between the High Authority and the Council when providing the jurisdiction-sharing techniques upon which the relationships of the EEC Commission and Council are based. There is some considerable degree of truth in this proposition, but one should not get the impression that the EEC relationships were consciously based on ECSC practice. The Council was transformed into the principal decision-making organ in the EEC structure because of the political reasons previously mentioned and because of the substantially different nature of the Coal and Steel Community Treaty when compared with the Common Market Treaty.

The former gives detailed treatment to an isolated (however artificially) sector of the relevant economies. The latter envisages the integration of the whole of the Member State markets in goods, services, labor and capital, and beyond that, the integration of the broader economic, social and commercial policies on which those markets are based. It does so, in many instances, in a necessarily skeletal fashion. Outside the provisions for the establishment of the customs union, the EEC Treaty has sometimes been viewed as an institutional and general policy framework for the concurrent creation of "sector" programs of the ECSC type.³² There is

³² Cf., Rapport fait au nom de la Commission des affaires étrangères sur le projet de loi (No. 4677), Assemblée Nationale (France), troisième Législature, session ordinaire de 1956-57, p. 171.

little difficulty in appreciating why the institution representing national interests should have the primary decisional competence in relation to these developments.

However, to concentrate on the ultimate decision-making power or to generalize about its locus by saying, e.g., that the Council has the power of decision wherever "delegations of sovereignty" have been made,³³ scarcely describes the jurisdictional relationships between the Council and Commission adequately. These jurisdiction-sharing arrangements can be classified in terms of at least four general categories.

The first and most important class of cases is that in which the exercise of jurisdiction is joint: The Council makes the final decision, but on the basis of a Commission proposal which it can alter only by unanimous vote. This procedure applies to virtually all of the "normative" or "rule-making" decisions necessary to fill out the legal framework of the Treaty.³⁴

Secondly, there are instances in which the Council and Commission act independently of each other. In fact, there are more of these instances than there are provisions for joint action, but in terms of policy determination they

³³ Ibid.

³⁴ EEC Treaty Arts. 7; 8(1), (2), (3), (5); 14(2)(c), (5), (7); 20, para. 3; 21; 25(1); 28; 33(5); 38(3); 43; 44(3), (4), (5), (6); 49; 51; 54; 55; 56(2); 57; 59, para. 2; 63; 69; 70; 75(1); 79(3); 87(1); 92(2)(d); 94; 98; 99; 100; 101; 103(2), (3); 108(2); 109(3); 111(2); 112(1); 113(3); 116; 126; 127; 201; 203; 209; 212, para. 2; 227; 228; 235.

are much less significant. In a number of cases the power conferred involves only the performance of a function, not the taking of an acte administratif, or, at least, not one directed to or affecting persons outside the institutional structure.³⁵ When the Commission exercises an independent power in terms of one of the five categories of administrative acts envisaged by the Treaty,³⁶ it is most often in the form of a decision authorizing a deviation from Treaty rules

³⁵ In relation to the Commission see, e.g., EEC Treaty Arts. 20 para. 2, 124, 205, 207, 225, 229, and in relation to the Council see, e.g., EEC Treaty Arts. 204, 206. See also, EEC Treaty Arts. 138(3), 140 para. 4, 152, 154, 157(1) para. 2, 159 para. 2, 160 para. 2, 165 para. 4, 166 para. 3, 172, 194 para. 2 and 196 para. 2, which give the Council extensive internal administrative powers over the other institutions.

³⁶ Article 189:

"For the achievement of their aims and under the conditions provided for in this Treaty, the Council and the Commission shall adopt regulations and directives, make decisions and formulate recommendations or opinions.

Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State.

Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means.

Decisions shall be binding in every respect for the addressees named therein.

Recommendations and opinions shall have no binding force."

by a Member State³⁷ or of a recommendation to Member States concerning the manner of fulfilling their Treaty obligations.³⁸ However, the Commission alone may take some decisions or directives of broader application³⁹ and under four, not totally unambiguous provisions, acts having the status of regulations.⁴⁰ The Council's independent jurisdiction seems to include five powers of a regulatory nature,⁴¹ five independent powers of "decision,"⁴² and a special treaty-making competence.⁴³

With respect to some of the instances of power to take independent, binding acts, it is difficult to formulate logical explanations for the failure to employ the joint-jurisdiction procedure or to explain why one or the other of the organs was chosen as the proper one to exercise the particular competence involved. That the Council should

37 EEC Treaty, Arts. 17(4); 25(2), (3) & (4); 33(2), para. 2; 33(6); 37(3), para. 2; 46, para. 2; 73(1), para. 1 & 73(2); 80(1), (2); 91(1); 107(2); 115; 226. (Since some of these provisions involve approval of action already taken, they might better be considered as after-the-fact directives. See, Ophuls, Les Reglements et les Directives dans les Traites de Rome, 1966 Cahiers de Droit Européen 3.)

38 EEC Treaty, Arts. 14(6); 15(2); 27; 35; 37(6); 64; 71; 81; 93(1); 102(1); 108(1), para. 1; 111(5).

39 See EEC Treaty, Arts. 33(2) & (4); 79(4); 89; 90(3); 93(2), para. 1; 97.

40 EEC Treaty, Arts. 10(2), 22, 48(3), 91(2).

41 EEC Treaty, Arts. 75(3), 84(2), 121, 136, 200(3).

42 EEC Treaty, Arts. 45(3); 73(1), para. 1; 76; 93(2), para. 2; 108(3), para. 2. (In three of these cases the power is to countermand independent Commission decisions.)

43 EEC Treaty, Art. 238.

determine rules for association (Art. 136) or financial contributions by states (Art. 200(3)) seems clear, but why is it given what seems to be an escape clause power in relation to transport (Art. 75(3)) when the general power to grant special deviations lies with the Commission?⁴⁴ The establishment of technical rules on customs administration (Art. 10(2)) and the computation of the common external tariff (Art. 22) are perhaps not sufficiently important to require Council action, but why is the Commission also given the seemingly broad power to determine the conditions under which workers of other Member States may remain in the Member State of their employment (Art. 48(3)(d))? Here, as in numerous other instances, the student of the Community legal system finds that he is attempting to fit together a jigsaw puzzle that has some political pieces missing.

The formal "consultation" procedure of the High Authority with ECSC Council finds little place in the EEC Council/Commission relationship. In a general manner they are exhorted to consult together on the basis of mutually satisfactory arrangements,⁴⁵ but the Commission is required to have non-binding consultation with the Council only when negotiating treaties⁴⁶ and the latter must obtain the former's

⁴⁴ See articles cited in note 37 supra. (This deviation is probably explainable as a concession to Dutch interests.)

⁴⁵ EEC Treaty, Art. 162.

⁴⁶ EEC Treaty, Arts. 111(2), para. 3; 113(3), para. 2.

opinion only in relation to certain internal administrative⁴⁷ and budgetary⁴⁸ matters and when acting on questions of treaty revision⁴⁹ or the admission of new states.⁵⁰

The fourth category of jurisdictional relationships is hierarchical - the Commission may be charged by the Council with the implementation of the latter's determinations⁵¹ or, in other circumstances, the Commission may exercise powers conferred directly by the Treaty but under the conditions laid down by the Council.⁵² This jurisdiction sharing based on delegation most clearly distinguishes the Commission-Council from the High Authority-Council relationship. Many have likened it to national divisions between legislative (or "quasi-legislative," whatever that means) and administrative competences,⁵³ but this comparison tends to generate more heat than light. Because the comparison is necessarily based on the nature of the acts rather than the nature of the body, those making it, having passed "through the looking-glass," have great difficulty making particular examples come out right-way-round.

⁴⁷ EEC Treaty, Arts. 153; 212, para. 1.

⁴⁸ EEC Treaty, Art. 203(2).

⁴⁹ EEC Treaty, Art. 236.

⁵⁰ EEC Treaty, Art. 237.

⁵¹ EEC Treaty, Art. 155, sub-para. 4.

⁵² EEC Treaty, Art. 213.

⁵³ For a particularly facile comparison see Graupner, The Rules of Competition in the European Community 137-46 (1965).

A rather interesting wrinkle on this question of delegation is that the delegation may in many cases be made only at the proposal of the delegate and must be repealed by the same means. It is partly for this reason that the Council has granted powers to the Commission in the area of agricultural policy which must be exercised in consultation with Management Committees made up of Member State representatives and has reserved the power to modify or revoke Commission regulations promulgated over the objections of these Committees. There is some substantial question in this writer's mind concerning the propriety of such a reservation by the Council of authority to act on agricultural questions without a Commission proposal.⁵⁴

We might also ask whether the Commission might implement Council action on its own initiative under the mandate of Article 155, para. 1, that it "ensure the application of the provisions of this Treaty and of the provisions enacted by the institutions of the Community." The answer to this question lies in defining what we mean by "initiative" and "implementation." Clearly the Commission has considerable initiative power to recommend action to the Council and to the Member States, to inform itself and in turn the Community about common problems and even to charge Member States with violations of the Treaty before the Court

⁵⁴ See, Bertram, Decision Making in the EEC: The Management Committee Procedure, 5 C. M. L. Rev. 246 (1967-68). See also infra at notes 100-101 and accompanying text.

of Justice. Moreover, these initiative powers may be employed as devices for implementing Council decisions. However, if we are speaking of a power to implement which includes a competence to issue binding decisions, directives or regulations, then the power to take such action must be found in some specific grant in the Treaty or in an act of the Council.⁵⁵ Any other interpretation would make the Commission the preponderant decisional, as well as initiative, organ in the EEC and would radically affect the Community-Member State jurisdictional balance.

Of course, as we noted in relation to the ECSC Treaty, the body exerting the preponderant influence in the EEC structure may depend more on operational "conventions" than on the textual division of competences. This was recognized at the time of the drafting of the EEC Treaty.⁵⁶ The partition of initiative and decisional powers in the more important areas of Community operation represents a compromise between "supranational" and "intergovernmentalist" sentiment among the Member States and is, in that sense, deliberately ambiguous.

To a certain extent the shift in influence from the High Authority to the Council evidenced in the

⁵⁵ The second, third and fourth paragraphs of Article 155 make this reasonably clear. See, Cartou, *Le Marché Commun et Le Droit Public* 74-76 (1959).

⁵⁶ *Chambre des Députés du Grand-Duché de Luxembourg, Lois du 30 Novembre 1957, Marché Commun, Euratom, Institutions Commun, Documents et Discussions Parlementaires 1957, p. 650-51.*

functioning of the ECSC structure seemed to have been reversed in the EEC institutional order in the early years of its operation. This may be explained in part by the circumstances under which the Commission had the good fortune of working. The attacks levelled against the Economic Community by other European states and the necessity of presenting a common front in several international conferences and negotiations helped to start the EEC off on a note of cohesion which favored the maximizing of the Commission's role. Very favorable economic conditions also played a significant part, and the Commission, by its rapid and effective work during the early years of the Community, seized these opportunities for exerting its influence.

Commission reports exude confidence, competence and accomplishment and leave no doubts about the Commission's position as defender of the Community interest. Nor is there any doubt that the Commission interprets that interest in political as well as economic terms and intends to use all the means at its disposal to develop the institutional order in the direction of the more progressive "European" sentiment.⁵⁷

However, since the "agricultural" crisis of 1965 and the Luxembourg communique which ended it, the Commission

⁵⁷ These attitudes were evident from the inception of the Community. See, e.g., Premier Rapport General de la Commission de la C.E.E. 13 (1958).

has had to be more circumspect. As the communique discloses, the basic thorn in the French side all along was the way the Commission had been playing politics.⁵⁸ Le petit quere between France and the Commission is still very much a fact of Community life.

In its more euphoric days the Commission has gone so far as to deny that the Council represents a coalition of Member State interests in its primary decision-making role, because such decisions are generally in the form of approval of the Community interest as formulated by the Commission.⁵⁹ However, this statement must be understood as something less than a frank appraisal of the functional relationship of the Council and Commission. It discounts, for example, the impact of the Committee of Permanent Representatives which has significantly lessened the Commission's monopoly on expertise and hard data in the formative stages of a Community decision.⁶⁰ Moreover, treaty provisions

⁵⁸ 2 CCH Common Mkt. Rep., para. 9084.

⁵⁹ Introduction to the Fourth General Report of the Commission of the EEC (1961). The parliament has questioned the extent to which the Commission's power of proposal is being used effectively to shape Community policy. See, e.g., Question écrite No. 7, C.E.E., Porte-parole de la Commission, 19 mai 1967.

⁶⁰ See Patijn, Permanent Representatives and 'Chefs de Cabinet', in 1967 Common Market No. 11, pp. 281-83.

notwithstanding,⁶¹ unanimity is the rule of Council operation and, as the resolution of the 1965-66 crisis witnesses, that procedure is not expected to change radically.

The Commission has itself recognized the effect of crises on the "systems orientation" or "Community Spirit" of the Council and its Permanent Representatives. Specifically because it feared loss of inter-partner confidence and demands for strictly reciprocal concessions which would jeopardize the rational introduction of integration measures, the Commission in 1963 set out a comprehensive action program for the second stage.⁶²

In fact, the balance between independent Community and Member State power and influence in the institutional order probably varies from issue to issue even where the same legal and conventional procedures are applicable. An extensive investigation of decision-making procedure in the field of agricultural policy⁶³ has revealed that the process is ponderous, complex and variable. The steps involved include:

⁶¹ The Treaty reads as of majority voting were the general rule, Art. 148, but only three instances have come to my attention where a simple majority is sufficient. Arts. 49, 128, 236. A tabulation of the specific provisions on voting in relation to substantive matters reveals that there are roughly an equal number of provisions calling for a qualified majority or for unanimity. About 1/3 of the latter are transformed into the former during or after the first two stages of the transitional period.

⁶² Sixth General Report of the Commission of the EEC 15-17 (1963).

⁶³ Lindberg, Decision Making and Integration in the European Community, 19 Int'l Org. 56 (1965).

- (1) Commission proposal, after consultation with various interest groups and consultative committees made up of national officials.⁶⁴ (2) The taking of national positions on the proposal by the competent national authorities. (3) Joint analysis of national positions at the technical level. (4) Political negotiation in the Council. (5) Re-introduction of a Commission "Package-Plan" based on the negotiations. (6) Use of deadlines and crisis techniques to force decision. (7) "Tying in" of various areas outside the primary one in order to achieve acceptable compromise.

Within this process the Commission's powers as initiator, technical expert and catalyst-liason organ were found to be extremely significant, but it must be noted that this may depend upon the sector involved and the people in charge. The pressures toward conformity with the Commission's proposals in the original or revised versions become very great as negotiation proceeds. However, non-conformity within the system remains possible and there is always the chance that a national decision taken outside the Community procedures may prevent agreement. The latter is essentially what happened in the 1965-66 breakdown of Council discussions on agriculture, a situation which also illustrates how

⁶⁴ The Commission has gone far beyond the terms of the Treaty in the association of national officials with the formative stages of Community policy. The Treaty establishes four consultative committees, but by 1965 the Commission had created thirty-one additional groups. Gaudet, The Challenge of the Changing Institutions, 3 C.M.L.Rev. 143, 148-49 (1965).

politically-oriented proposals, there independent Community financing under Parliamentary control,⁶⁵ may logically be "tied-in" with primary areas of discussion.

Parliamentary activity under the EEC Treaty follows much the same lines as that described in relation to the ECSC Assembly. Control over the independent executive was strengthened by allowing a vote of censure at any time⁶⁶ and this, given the parliament's general attitude, could tend to strengthen the Commission's hand in its dealings with the Council. The Parliament was also given a power of proposal in relation to the budget⁶⁷ and, as under the ECSC Treaty, must be consulted in relation to certain activities. Constitutionally it is a weaker institution under the EEC than under the ECSC Treaty because it has no control over the primary decisional organ. Attempts have been made to establish a close, "conventional" relationship between the Parliament and the Council, but they have not proved particularly

⁶⁵ Commission Proposal of 31 March 1965.

⁶⁶ EEC Treaty, Art. 144.

⁶⁷ EEC Treaty, Art. 203(3).



fruitful.⁶⁸

C. The Combined Executives

The concurrent operation of three separate Communities has caused difficulties.⁶⁹ Logically the treaties should be amalgamated, but this step has been impossible because such negotiation would invariably raise latent political disagreements which are presently thought to be insoluble.⁷⁰ A partial solution pending full unification of the treaties has been devised in the form of a Treaty Instituting a Single Council and a Single Commission of the European Communities.⁷¹ This, in effect, formalizes and rationalizes the close cooperation that has necessarily taken place among the separate executives. The single Council and Commission will still function under the specific provisions of

⁶⁸ By holding a colloquy with the Parliament and the three independent executives in November 1959, the Council showed some willingness to cooperate with the Parliament, but it declined to bind itself to more far-reaching consultation commitments proposed by the Parliament.

The Parliament was particularly unhappy, for example, about the Council's failure to consult it until after the signing of the Greek Association Treaty. The argument that this was in accord with national practice failed to impress the European parliamentarians for they had no effective power to influence the Treaty after it was formalized. A suggestion was even made that the Parliament sue the Council before the Court of Justice. *Débats (Parlementaires)* 19 September 1961, p. 40-42.

⁶⁹ See, e.g., Kapp, *The Merger of the Executives of the European Communities*, Chapter I (1964).

⁷⁰ See, e.g., Pescatore, *Les perspectives du développement institutionnelle a la suite de la "crise du Marché Commun"*, in *Colloque sur la Fusion des Communautés Européennes* (Liège, 1966).

⁷¹ French text at 1 Rev. Trim. de Dr. Eur. 440 (1965).

the three separate treaties, but the line between EEC and ECSC operational procedures must be expected to become even vaguer under the new arrangement.

The few developments of note in the "unification" treaty are that the Parliament's control functions under the ECSC Treaty have shifted to the EEC model, as have the appointment procedures for the new Commission, and the independent financing arrangements of the Coal and Steel Community will now tend to be submerged in the much larger single budget for all three Communities. There is presently some concern about how the new Commission may work in practice and whether its past level of influence can be maintained. This depends on many factors, not least of which are the membership and presidency of the new executive and whether "Parkinsonian" principles will operate to make the interim fourteen-member Commission less cohesive and decisive than the ~~nine~~-member EEC Commission has been.

II. The "Division of Competences"

In a federal state constitutional structure we are accustomed to thinking in terms of a division of competences by subject-matter between federal and state governments. This division is often complicated by overlapping and concurrent jurisdiction, but each level of government has the power to regulate its proper sector in much the same manner, by establishing directly effective norms and by enforcing them independently of the policy determinations of the

coordinate federal or state authority. On the other hand, in relation to the classical (to the extent that there is such an abstract animal) international organization, one tends to be concerned, not only with the organization's subject-matter competence, but also with what form its policy determinations take and how they may be applied and enforced. If we consider even one of the more progressive norm-creating structures, the I.L.O., we find that the agreed rules become effective only through ratification or adoption by individual state governments and there is no breach of an international obligation if the attempt at ratification or adoption fails. More common would be international organizations in which any new formal norm-creation is effected by additional treaties or protocols.

Although certain points of similarity may be discovered, the division of competences between Community and Member-State institutional orders cannot be subsumed under either of these simplified, traditional categories, nor is it really a combination of the two. Again we are faced with rather complex techniques of jurisdiction sharing which vary from subject to subject and which are qualified fundamentally by the jurisdiction-sharing scheme within the Community institutional order outlined above. It must also be recognized that the extent and nature of the powers afforded the Community institutions are not always a function only of ideas about the desired Community-Member State balance of power; the Treaty provisions are also based on decisions

concerning the powers any "governmental" agency should have to intervene in the relevant market and the nature of the economic facts sought to be regulated.

A. The ECSC Approach

The general approach to jurisdiction sharing under the ECSC Treaty has been to carve out a specific economic sector and to give the Community institutions extensive powers of direct control over that sector. The concrete jurisdiction-sharing problems that arise in this context are very like those encountered in a federal-state system - where does one subject-matter competence end and another factually-related one begin?⁷² The "factually-related" competence in this case is the general Member State jurisdiction over tangential and interdependent sectors and over general economic policy.⁷³

⁷² Thus control over a particular subject matter may "imply" certain powers, *Federation Charbonniere de Belgique v. High Authority*, Case No. 8/55, II Rec. 291, 29 Nov. 1956, but the implication is limited by the necessity of balancing Community competence with Member State competences. *Italian Government v. High Authority*, Case 20/59, VI Rec. 663, 15 July 1960; *Netherlands Government v. High Authority*, Case 25/59, VI Rec. 723, 15 July 1960. See also, *Re Amendment of ECSC Treaty Article 56*, V Rec. 533, 17 Dec. 1959; *Barbara Erzbergbau A. G. v. High Authority*, VI Rec. 367, 10 May 1960; *De Gazemenlijke Steenkolenmijnen v. High Authority*, Case 30/59, VII Rec. 1, 23 Feb. 1961.

⁷³ A good example of how this division of jurisdictions can create crises for the sector under Community control is provided by the difficulties experienced in the coal sector because of the lack of an overall energy policy. See, Twelfth General Report of the High Authority 72-80 (1964).

However, the description of the division of competences in the ECSC Treaty cannot be left at this general level. One author, taking a properly particularistic approach, has isolated five categories of competences set out in the Coal and Steel Community Treaty:⁷⁴ (1) Competences exclusive to the Community, (2) Concurrent Community-Member-State competences, (3) Competences reserved to the Member States, (4) Member-State competences which must be exercised in accordance with Community-determined policy, and (5) Member-State competences the exercise of which must be harmonized among the six partners. Within the first three categories the Community and Member-State institutional orders exercise coordinate functions of norm-creation, application and enforcement, but in the latter two the division of competences has juridical as well as substantial aspects. Category four, "bound competences," involves situations in which individual rights and duties are applied and enforced, and sometimes created, by Member-State machinery, but under the direction of treaty norms or of binding decisions or recommendations by the Community institutions. The fifth category envisages general cooperation between the Member States directed at collective action on common problems.⁷⁵

⁷⁴ Prieur, *La Communauté Européenne du Charbon et de l'Acier* 128-35 (1962).

⁷⁵ This is really a redefinition of Prieur's "competences harmonisées." *Id.* at 134. His example, Art. 10 of the Convention on Transitional Provisions, still fits, but it must be noted that the competence becomes "bound" if member governments fail to agree on harmonized action.

This cooperation is usually undertaken at the initiative or under the guidance of the Community institutions.

B. The EEC's Shift of Emphasis

The same categories may be used to describe the division of competences provided by the EEC Treaty, but the emphasis seems to have shifted from the federal-type division, categories one through three, to jurisdiction sharing based on the juridical divisions of function found in categories four and five. To put it more concretely, the Community exercises its jurisdiction on or through Member States in a larger proportion of cases under the EEC Treaty than under the ECSC arrangement and the necessity of a joint exercise of power to produce a single result becomes the predominant characteristic of jurisdiction-sharing in the general common market.

This shift in emphasis, like most things in the European Communities, has both political and economic roots. "Institutional federalism," the placing of enterprises subject to national governmental control under the coordinate, direct control of the ECSC institutional order for purposes connected with coal and steel production, makes economic sense in an oligopolistic sector traditionally subject to state intervention. This sort of direct relationship between Community institutions and enterprises is less important where the aim is to integrate whole economies on the basis, primarily, of eliminating artificial barriers to the free play of market forces. On the political side, it is

perfectly obvious that the political implications of creating the same direct Community institutional control over the whole economy in the EEC Treaty that the ECSC Treaty creates over the coal and steel sector would have been enormous. The predominant "institutional federalism" of the ECSC has thus been transformed into a hybrid "normative-institutional federalism" which involves policy creation at the Community level, either by a Treaty provision or an institutional determination, and the association of national governmental machinery in varying ways with the execution of the common policy.⁷⁶

This comparison between the two treaties can be amply illustrated. The ECSC may generate its own funds by taxing the enterprises subject to its jurisdiction; it may directly finance projects in the coal and steel sector and set up joint financing structures of any type appropriate to implement Community objectives, control production and prices, regulate agreements and concentrations, and sanction violations of its determinations.⁷⁷ Its primary administrative tools in the exercise of these competences are decisions, individual or general, which directly affect the legal position of coal and steel enterprises. Policy determination,

⁷⁶ An excellent analysis of the two general methods of association or "subordination" of state machinery in the implementation of common policy appears in Cartou, Le Marché Commun et le Droit Public 78-84 (1959).

⁷⁷ See generally, ECSC Treaty, Chapters II-VI.

implementation and enforcement take place wholly within the Community institutional structure. There are few instances where the Treaty merely creates an obligation for Member States.⁷⁸ Only occasionally, where Member State governmental competence to deal with questions relevant to the whole national economy (e.g., in the areas of wages and labor mobility, transport, and commercial policy) is recognized as strongly influencing the coal and steel sector, is the Community given jurisdiction which must be exercised in conjunction with or through Member State authorities.⁷⁹

The position is quite different under the EEC Treaty. For one thing there are many more instances where action is to be taken by Member States in accordance with obligations assumed under the Treaty.⁸⁰ This is true in substantial part because the Treaty envisages a gradual elimination of quantitative restrictions and customs duties along with the gradual creation of a common external tariff, whereas the ECSC Treaty accomplished the former all at once⁸¹ and dealt with the latter only to the extent that the failure to create a common external tariff might result in serious damage to internal Community production.⁸² Second, the vast

⁷⁸ See, e.g., ECSC Treaty, Art. 69.

⁷⁹ See, e.g., ECSC Treaty, Arts. 68(2), (3); 70; 74; 75.

⁸⁰ See generally, EEC Treaty, Part Two, Title One.

⁸¹ Convention on Transitional Provisions, Art. 8.

⁸² ECSC Treaty, Art. 74.

majority of all Community actions under the Treaty of Rome require some measure of national implementation. Provisions for the taking of "decisions" are almost exclusively confined to situations involving Commission supervision of the fulfillment by Member States of their Treaty obligations. In only two instances are decisions directed to individuals or enterprises envisaged.⁸³ By far the commonest powers conferred are powers to issue "regulations," norms which are directly binding within all the Member States, or "directives" to member governments, which are binding as to the ends to be achieved but leave domestic agencies free to choose the form and means of implementation.⁸⁴

It would seem a simple matter then to determine the areas in which jurisdiction-sharing follows the ECSC-type, subject-matter division and those in which joint action is required by a tabulation of instances involving regulatory competence and those entailing Community directives followed by national measures pursuant thereto. Such a tabulation would, in broad terms, reveal that in the areas of the right of establishment, free movement of capital and services, fiscal policy, approximation of laws affecting Community development and balance of payments stability, Community institutional competence is limited to the formulation of common

⁸³ EEC Treaty, Arts. 79(4) and 89.

⁸⁴ For a more or less complete list of articles providing a competence to issue directives and regulations see, Ophuls, Les Règlements et les Directives dans les Traités de Rome, 1966 *Cahiers de Droit Européen* 3.

rules which have no effect until implemented by national governmental action. On the other hand, in the areas of common external tariffs, agricultural policy, transport policy, commercial policy, policy relating to economic trends, regulation of competition, free movement of workers and the allowability of state aids, the Community can exercise a "directly-effective" regulatory competence.

However, this "regulatory" competence requires some considerable explication - explication which qualifies any firm conclusions that might be drawn from the simple existence of a regulatory rather than a "directive" power in specific cases and which reveals a great deal about the essential nature of jurisdiction sharing in the EEC. The power to issue "directly effective" norms does not necessarily involve a substitution of Community for national implementation machinery, as is the case in the ECSC. Nor do regulations always affect individual subjective rights in the same manner or to the same extent or create a direct relationship between private legal persons and the Community institutional order. Cases have already come before the Court of Justice which involved serious questions of whether a particular part of a "regulation" was or could be applicable before the introduction of state measures of implementation.⁸⁵

⁸⁵ E.g., Caisse Commune d'assurances "La Prevoyance Sociale" v. Bertholet, Case No. 31/64, XI-6 Rec. 111, March 11, 1965.

We might, for example, contrast the use of regulatory competence in the fields of competition and transport-tariff discrimination with its use in areas such as economic trends, commercial policy or state aids. Within the former categories rights and duties are created for individuals and enterprises within the Member States, measures of execution are entrusted to the Commission and persons affected are responsible directly to the Community for the performance of the obligations imposed.⁸⁶ In the latter cases the general policies and criteria laid down in Community regulations are made concretely effective through their application by Member States.⁸⁷ Nor have the uses of the Community's regulatory competence been exhausted by these two sets of examples. Regulations may also be used to establish and regulate the activity of bodies at the Community level,⁸⁸ define the relationship between the Community and its employees,⁸⁹ modify or

⁸⁶ EEC Treaty Arts. 79 and 87; Regulation No. 11, 52/60 J.O. 1121 and Regulation 17, 13/62 J.O. 204. (Note that Reg. No. 11, Arts. 14 and 16, require some measure of national execution.)

⁸⁷ The regulations adopted (Reg. 3/63, 14/63 J.O. 153) and proposed (See CCH Com. Mkt. Rep. para. 3821) under Article 111 reinforce the impression given by the wording of EEC Arts. 94 and 110-116 and by the nature of the activity regulated that national execution of common policies is contemplated. Indeed it would seem that a decision addressed to Member States will in most cases be more appropriate than a regulation. See, e.g., Decision of the Council Relating to an Action Program for the Common Commercial Policy, 90/62 J.O. 2353.

⁸⁸ See, e.g., EEC Treaty Art. 127.

⁸⁹ EEC Treaty, Art. 212.

complete certain treaty provisions⁹⁰ or create subjective individual rights which modify but do not replace the application of national legislative and administrative provisions.⁹¹

The effect of regulations is different in these various areas because the purpose of Community action is different. To take the first examples given, regulations concerning "anti-trust" problems or transport discrimination seek to deal with private interference with market forces whereas, in the case of economic trend policy, commercial policy or state aids, governmental activity is in question. In the latter situations the use of a regulation rather than directives is not particularly significant. In either case national measures of execution are required, and often the Treaty provides for either type of action at the Community institutions' option.

The existence of a substantial number of Community regulatory competences under the EEC Treaty need not, then, substantially qualify the distinction that has been made between the nature of the division of competences in the Coal and Steel and in the Economic Community. That a directly effective norm is promulgated does not indicate that direct powers of control are being exercised by Community institutions in the implementation of that norm. Yet, the power to issue regulations is significant because wherever "directly

⁹⁰ E.g., EEC Treaty, Art. 14(7).

⁹¹ See generally, Reg. No. 3, J.O., 16/12/58, p. 561/58.

effective" Community norms may be used a corresponding power of execution could be delegated to the Commission⁹² or to some specially constructed Community body.⁹³ Moreover, the Community has a general regulatory competence which is bound only by the requirement that it be exercised in pursuit of the objectives outlined in the Treaty.⁹⁴ Given appropriate political decisions the Community's regulatory competence is a potential tool for the transformation of the balance between normative and institutional federalism in the Community and hence of the jurisdictional relationship between the Community and its Member States.

Three of the more important uses made to date of the Community's regulatory competence illustrate what complex and various adjustments of Community and Member State competences may evolve. Under the EEC Treaty's competition provisions, for example, it is clearly contemplated that an implementation system excluding national application of the Community norms might be created.⁹⁵ Such a system would involve a strict concurrence of jurisdictions, for national

⁹² EEC Treaty, Art. 155.

⁹³ This is presumably an implied power of the Council. See EEC Treaty, Art. 177, para. 1, (c). For a criticism of the device of specially created administrative bodies in the Community institutional order see Maas, The Administrative Commission for the Social Security of Migrant Workers: An Institutional Curiosity, 4 C.M.L. Rev. 51 (1966).

⁹⁴ EEC Treaty, Art. 235.

⁹⁵ EEC Treaty, Art. 87.

governments would remain free to enact and enforce national rules on the same subject. However, the Council decided to allow the application of the competition rules in part by national authorities and also to associate national cartel and monopoly officials with the Commission's execution of the Treaty and regulations.⁹⁶

Likewise, Regulation No. 11 on discrimination in transport rates, in enacting under Article 79 (3) the "provisions necessary to enable the institutions of the Community" to ensure compliance with Article 79 (1), creates a system for the collection of the basic information necessary for enforcement which is applied and sanctioned by Member States.⁹⁷ However, within the same regulation the Council takes an essentially contrary approach where violations of the anti-discrimination provisions are found to exist. It implies a Community power of direct pecuniary sanction against the offending carrier,⁹⁸ an implication which can be and has been severely criticized.⁹⁹

⁹⁶ Council Regulation No. 17, Arts. 9-10, 13/62 J.O. 204. See generally, Buxbaum, Incomplete Federation: Jurisdiction over Anti-Trust Matters in the European Economic Community, 52 Calif. L. Rev. 56 (1964), for a discussion of the complex problems involved in this division of competences.

⁹⁷ Council Regulation No. 11, Arts. 5 para. 1, 6, 11, 13, 16, 52/60 J.O. 1121.

⁹⁸ Id. at Art. 18.

⁹⁹ Precigout, La sanction des infractions aux reglements de la C.E.E., 5 Rev. du Marché Commun 142 (1962).

The Council regulations on agriculture, which account for about 95% of the regulations thus far issued, are also instructive. Agriculture is, of course, a special situation. The objectives of a common policy had to go beyond reduction of barriers to trade and general alignment of economic policies to take account of the special social and structural features of national markets. A high level of Community regulatory activity in that sector was probably inevitable, but the means chosen to organize the more important markets - the replacement of customs duties by a Community levy system based on a Community price system - certainly intensified activity at the Community level and made Articles 44 and 45, under which national action during the transitional period was envisaged, substantially obsolete.¹⁰⁰ However, implementation of the common policy is largely in the hands of the Member States and delegations of functions to the Commission are somewhat qualified by the association with it of advisory Management Committees for each agricultural sector, composed of representatives of the Member States but presided over by a member of the Commission.¹⁰¹ While levy revenues presently accrue to Member States, they are in effect made progressively applicable to the Orientation and

¹⁰⁰ See, e.g., Council Regulation No. 19, Art. 18(1) & (3), 30/62 J.O. 933, April 20, 1962.

¹⁰¹ *Id.* at Arts. 17, 18, 23, & 26. Some insight into the relationship of the Commission with these Committees is provided in "Reponse á la question écrit No. 156 posée par M. Vredeling," C.E.E., Porte-Parole de la Commission, 20 avril 1967.

Guarantee Fund. The Fund will eventually assume all financial responsibility for price support interventions, export refunds and structural programs.¹⁰² But, it will not, with the exception of structural projects, finance them directly; it will only make good state expenditure undertaken in accordance with Community criteria.¹⁰³

Looking at these three examples, which are really very partial descriptions of the nature of the regulations promulgated in each case, one begins to perceive how extremely flexible the Community regulatory competence is. In fact, if a single adjective were to be applied to the whole of the division of competences under the EEC Treaty, I would suggest that it should be "flexibility."

This characterization applies equally to competences involving Community action by means of directives. Directives thus far promulgated raise substantial questions about whether a significantly greater measure of discretion need be left to Member States in their execution than when state implementation of regulations or decisions is in question.¹⁰⁴ Indeed, it is repeatedly suggested that directives might also have "direct effect" in certain circumstances,¹⁰⁵ while at the

¹⁰² Council Regulation No. 25, 30/62 J.O. 991, April 20, 1962.

¹⁰³ Council Regulation No. 17/64, 34/64 J.O. 586.

¹⁰⁴ See discussion by Sohler et Megret, Le Role de l'exécutif national et des législatures nationales dans la mise en oeuvre du droit communautaire, in Droit Communautaire et Droit National 107, 108-16 (1965).

¹⁰⁵ Waelbroeck, 1967 Cah. d. dr. eur. 184, 192-93 (Commentary on the Lütticke cases).

same time others decry the lack of effective implementation of directives presently "in force."¹⁰⁶

Concluding Comments

The foregoing description of the general pattern of jurisdiction-sharing in the European Communities is, perhaps, a bit confusing. That cannot be avoided. The questions that were posed about the constitutional organization of the Communities have been answered in different ways in relation to different aspects of the structure. Recurring themes have been "ambiguity," "flexibility," "complexity." Clearly the "jurisdictional balance" of the system may develop in several directions, or, in fact, in all of them at once.

An appreciation of the complexity and fluidity of the legal relationships between independent Community and Member State interests in general is a necessary background for the analysis of the relationship of the Community Court with Member State courts. These relationships are jurisdictional and the Court of Justice, like all courts, must interpret its own jurisdiction. In so doing it must take into account, if not overtly use, what it deems to be the overall purposes of the Community structure. By way of illustration, one might note that the most important, or at least the most notorious, decision on state and federal judicial jurisdictions in the modern history of the United States Supreme

¹⁰⁶ Tallon, Le droit communautaire: Réalités et illusions, 1966 Cah. d. dr. eur. 571.

Court, Erie R. R. v. Tomkins,¹⁰⁷ rests on little more than its appropriateness under the American federal system.

To the extent that the purposes of the Community structure are unclear or undecided, the Community Court may find itself with difficulties, or, perhaps, with opportunities. Its decisions must be evaluated in the light of that vague standard which relates them to the whole of the Community organization - "appropriateness under the system."

¹⁰⁷ 304 U.S. 64, 78 (1938).

Chapter III. A Court in a Community

The appropriateness of determinations concerning Community Court-national court jurisdictional relationships is, of course, also related to the general function of the Court of Justice within the Community system. In the widest possible terms the Court has the task of ensuring the observance of law in the interpretation and application of the treaties. This function is carried out over an extraordinarily wide range of jurisdiction. As one commentator has put it,

"[T]he Court is an administrative court, with strong undertones of a constitutional court in specific instances, as well as a civil court. And in a few instances it operates as an international court, a disciplinary tribunal and even as an arbitrator."¹

To be more specific the Court exercises a jurisdiction:

(1) to determine the validity of executive action at the suit of Community organs,² Member States,³ or third persons affected by such action;⁴ (2) to enforce Community norms and

¹ Bebr, *Judicial Control of the European Communities* 22-23 (1962). Similar statements are common in other discussions. See, e.g., Campbell & Thompson, *Common Market Law* 10 (1962).

² ECSC Treaty, Arts. 33(1), 35(1), 38(1); EEC Treaty, Arts. 173(1), 175(1), 180(b)(c); (EURATOM Treaty, Arts. 146, 148).

³ ECSC Treaty, Arts. 33(1), 35(1), 37(1), 38(1); EEC Treaty, Arts. 173(1), 175(1), 180(b)(c); (EURATOM Treaty, Arts. 146(1), 148(1)).

⁴ ECSC Treaty, Arts. 33(2), 35(1), 36(2), 48(3), 66(5.2) (6.2); EEC Treaty, Arts. 173(2), 175(3); (EURATOM Treaty, Arts. 146(2), 148(3)). See also, EEC Treaty, Art. 184; (EURATOM Treaty, Art. 156).

See also in connection with the determination of the validity of executive action the provisions for referral from domestic tribunals when such action is called in question in litigation before them. ECSC Treaty, Art. 41; EEC Treaty, Art. 177; (EURATOM Treaty, Art. 150).

decisions against Member States⁵ and against individuals and enterprises;⁶ (3) to determine matters of Community law on referral from Member State Courts;⁷ (4) to hear suits between Member States concerning matters affecting their Community obligations either under compulsory judicial procedures⁸ or by virtue of a compromise;⁹ (5) to render binding advisory opinions;¹⁰ (6) to hear cases concerning disputes between the Community organs and their employees¹¹ and litigation involving the general liability of the Communities;¹² (7) to order the removal of a member of the Communities⁹

⁵ ECSC Treaty, Art. 88; EEC Treaty, Arts. 93(2.2), 169, 170, 180(a), 225(2); (EURATOM Treaty, Arts. 21(3), 38(3), 81(3)(4), 82(4), 141(2), 145(2)).

⁶ ECSC Treaty, Art. 36(2); EEC Treaty, Art. 173(2); (EURATOM Treaty, Arts. 81(3)(4), 144(b), 145(2), 146(2)). Such cases will take the form of an appeal by the individual or enterprise against executive action directed to him, except in the case of EURATOM Treaty, Arts. 81(3)(4), 145(2). It is questionable whether the latter article should be included under "enforcement" against individuals because Member State action is yet required in order to sanction a violation thus determined.

⁷ ECSC Treaty, Art. 41; EEC Treaty, Art. 177; (EURATOM Treaty, Art. 150).

⁸ ECSC Treaty, Art. 89(1); EEC Treaty, Arts. 93(2.2), 170, 225(2); (EURATOM Treaty, Arts. 38(3), 142).

⁹ ECSC Treaty, Art. 89(2); EEC Treaty, Art. 182; (EURATOM Treaty, Art. 154).

¹⁰ ECSC Treaty, Art. 95(4); EEC Treaty, Art. 228(2); (EURATOM Treaty, Arts. 103(3), 104(3)).

¹¹ ECSC Treaty, Arts. 34, 40, 47; EEC Treaty, Art. 179; (EURATOM Treaty, Art. 152).

¹² ECSC Treaty, Arts. 34, 40, 47; EEC Treaty, Art. 178; (EURATOM Treaty, Arts. 12(4), 151).

executives;¹³ (8) to suspend the execution of executive action and make other interim orders in aid of its own jurisdiction;¹⁴ (9) to hear appeals from a special arbitration committee provided under the EURATOM Treaty;¹⁵ and formerly (10) to annul Member State action in one special case, wrongful use of the right to veto appointees to the High Authority.¹⁶ The Court may also make use of jurisdictional grants provided in contractual stipulations,¹⁷ Council regulations¹⁸ and Member State laws.¹⁹

The Court as Arbiter of the Jurisdiction-Sharing System

The description of the Court's jurisdiction quoted above reveals that the Court suffers no less from terminological problems than does the Community as a whole, perhaps more. All of the terms used, "administrative," "international," "constitutional," may be justifiably employed. The Court does exercise control over an "executive" on the basis

¹³ ECSC Treaty, Art. 12(2); EEC Treaty, Arts. 157(2), 160; (EURATOM Treaty, Art. 129).

¹⁴ ECSC Treaty, Arts. 39, 92; EEC Treaty, Arts. 185, 186; (EURATOM Treaty, Arts. 157, 158).

¹⁵ Art. 18(2).

¹⁶ ECSC Treaty, Art. 10(10).

¹⁷ ECSC Treaty, Art. 42; EEC Treaty, Art. 181; (EURATOM Treaty, Art. 153).

¹⁸ EEC Treaty, Art. 172. See, e.g., Regulation No. 11, Art. 25; Regulation No. 17, Art. 17.

¹⁹ ECSC Treaty, Art. 43.

of criteria borrowed primarily from French administrative law. It is concerned with suits about "treaties" and involving traditional subjects of international law. The control exercised may be described as "constitutional" for a number of reasons: because it is based on a "constitutional" document,²⁰ because it is a "rudimentary political control" in certain instances,²¹ because of the nature of the acts which may be annulled.²²

However, there is a more general reason for viewing the Court of Justice as a court exercising constitutional jurisdiction. The three most important aspects of the Court's jurisdiction, (1) the jurisdiction provided to control Community institutional action, (2) to declare the non-fulfillment by states of their treaty obligations and (3) to give authentic interpretations of the Treaty, are the juridical techniques by which the Court exercises its more profound function as arbiter of the jurisdiction-sharing relationships between the Community and the Member States.²³ In thus regulating the exercise of their respective competences over

20 "...le Traité se présente - je ne dis pas 'est' pour éviter toute querelle doctrinale et j'ajoute même du point de vue de la Communauté - se présente donc du point de vue de la Communauté, sous les apparences d'une Constitution et d'une législation économique commune." Lagrange, *Les Problèmes juridiques et économiques du Marché Commun* 43 (1960).

21 Bebr, op. cit. supra note 1, at 149.

22 Pescatore, La Cour en tant que juridiction fédérale et Constitutionnelle, in Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften 520 (1965).

23 Lagrange, *La Cour de Justice de la C.E.C.A.* 1954 R.D.P. 417, 434-35.

individuals in accordance with the Treaties, the Court exercises an essentially federal constitutional control.²⁴ That this should be the case is both substantiated and explained by the rationale for the Court's creation.

The existence of a court of law competent to supervise the allocation of jurisdiction within the Communities is in a sense a logical outgrowth of the general Community development. As organizations move away from classical, international, legal control through Member State participation in decision-making, they must begin to substitute internal controls of the national "check-and-balance" type.²⁵ On the other hand, given the novelty and fluidity of the jurisdictional relationships created, there were some initial doubts concerning the appropriateness of the creation of a court of law.

The jurisdiction given the Community Court is probably better understood if approached from the standpoint of responses to specific problems. Unfortunately for the student of the Court, most of the documents that would fully explain the impetus for the inclusion of specific jurisdictional

²⁴ Feld, The Court of Justice of the European Communities 38 (1964).

²⁵ Hahn, Constitutional Limitations in the Law of the European Community [1963] 1 Recueil des Cours 195, 202 (1964). The simple fact that a court employing primarily "judicial" procedures exists may be thought to reflect something about the stage of the "federalizing process" in the Communities. See Friedrich, International Federalism in Theory and Practice in Systems of Integrating the International Community 147 (1964).

provisions are secret,²⁶ and statements by interested parties, to the extent that any concerning the Court were made, are often conflicting. However, some things are known and others may be hypothesized without much fear of serious error.

1. Institutional Control

The primary consideration in the creation of the ECSC Court must have been control of the High Authority.²⁷ Even after the addition of the Council and Assembly, some further means of control which would not compromise the executive's independence was necessary. In this regard serious consideration was given to the creation of an organ exercising a general political control over the institutional structure.²⁸ An institution exercising this type of competence seems to have been desired, among other reasons, for purposes of flexibility should Member States encounter serious economic problems in the implementation of the Treaty. It is in this area of safeguard measures that the ECSC Treaty gives the Court of Justice its one grant of jurisdiction which clearly goes beyond the ordinary bounds of legal control.²⁹ The weakness of the Assembly's political control also argued in favor of

²⁶ See statement by Dehousse, 11/63 Debats No. 59, p. 60-61, 16/10/62.

²⁷ See, e.g., Rapport de la Delegation Française sur la Traité instituant la C.E.C.A. (1951).

²⁸ Valentine, The Court of Justice of the European Communities 1 (1965) (Proposal attributed to Monnet's Commisariat general du Plan).

²⁹ ECSC Treaty, Art. 37.

the creation of a sort of "policy overlord" or, perhaps, an arbitral tribunal to round off the institutional structure.³⁰ However, in the end a court of law was instituted, with jurisdiction to annul High Authority action on grounds of incompetence, major violation of procedure, violation of the Treaty or any rule of law relating to its application, or detournement de pouvoir.

In order to uncover the rationale for the creation of a judicial body with more or less well understood bases for the exercise of its supervisory function, we must recall what was said in the previous chapter concerning the "pluralistic base" of the Community. All of the participants had interests which had been painstakingly negotiated into the Treaty. The institution of judicial control on the basis of legal criteria must have seemed the best means whereby these interests could be protected.³¹ An independent political agency to oversee High Authority action, which could not only quash executive action but also substitute its own policies, was not desirable. Two policy determinations may be better than one, but conformity with the Treaty is not thereby insured. An arbitral tribunal might have lacked the procedural safeguards, definite legal criteria and continuity to maintain

³⁰ It has been suggested that in general terms the powerfulness of the Court may be explained by the weakness of the Assembly. Mason, *The European Coal and Steel Community* 40 (1955).

³¹ The Dutch were particularly outspoken concerning their reliance on the Court to protect their interests. Haas, *Uniting of Europe* 149 (1958).

respect for the Treaty as a whole.³²

That this so-called "administrative" control of the Court is fundamentally oriented toward maintaining the jurisdictional balance between the High Authority and Member States is evidenced by the ability of state governments, individually or collectively, to enforce legality of operation even where their "interests," in an administrative law sense, are not affected by a particular executive act.³³ The Court's institutional control is balanced and completed by giving the High Authority, along with the Member States, an appeal against the deliberations of the Council and the Assembly, which is directed at keeping them within the bounds of their competence and substantial procedural requirements.³⁴

2. Control of Member-State Action

Maintenance of the jurisdiction-sharing system established by the Treaty also involves control of Member State action. The Court is thus given jurisdiction to determine at the suit of Member States or the High Authority that Member States have not fulfilled their treaty obligations³⁵ - a determination which may be interpreted as synonymous with

³² On the distinction between the functioning of an international court and an international arbitral tribunal see Fachiri, *The Permanent Court of International Justice* (2d. ed. 1932).

³³ ECSC Treaty, Art. 33.

³⁴ ECSC Treaty, Art. 38.

³⁵ ECSC Treaty, Arts. 88 & 89. (Under Art. 88 the Member State will be the formal plaintiff, but the aggrieved party is really the Community represented by the High Authority.)

a declaration of the exercise of an improper jurisdiction. This is true whether the State conduct in question takes the form of a positive act encroaching on the subject-matter competence of the Community institutions or of a negative encroachment on that competence by virtue of a failure to perform a treaty obligation embodying Community policy. The decisions of the Court of Justice in suits of this apparently "international" type support the view that such litigation is fundamentally concerned with the internal constitutional order of the Communities, rather than with international obligations in a contractual sense.³⁶

3. EEC Modifications

The basic ideas of judicial control over Community institutions and Member States were carried over from the ECSC Treaty to the general Common Market structure, but with changes which reflect the different institutional balances and "division of competences" of the latter. The shift of decisional power to the Council required the provision of judicial jurisdiction to hear appeals against the Council's actions on the same grounds and by the same parties specified in the jurisdiction to review the action of the independent executive.³⁷ Likewise the increased policy role of the Council and the more flexible control of the Commission by the

³⁶ See, e.g., EEC Comm'n v. Luxembourg, Cases Nos. 90/63, 91/63, X Rec. 1217, 1232, Nov. 13, 1964; EEC Comm'n v. Luxembourg, Cases Nos. 2 & 3/62, VIII Rec. 813, 14 Dec. 1962.

³⁷ EEC Treaty, Art. 173.

Assembly may be related to the elimination of the Court's explicitly political control in the area of state safeguard measures.³⁸

One might have thought that the importance of the Council with its national representation in the EEC structure should have resulted in limitations on the ability of Member States to challenge executive action. Yet this did not occur. That it did not is perhaps explainable by reference to the essential instability of Council-Commission relationships and the supposedly built-in development toward majoritarian procedures in the Council. The increase in effective Member-State influence in the institutional order was not so dramatic that Member States were willing to forego their privileged position with respect to challenging the validity of executive action. The retention of this position is in a sense counter-balanced by placing the reciprocal legal interventions of the Council and the Commission on the same footing.³⁹

Of much greater significance is the recognition in the Court's jurisdiction of the basic shift in jurisdiction-sharing technique in the EEC from the "institutional federalism" of the ECSC to what we have called "normative-

³⁸ Compare ECSC Treaty, Art. 37, with EEC Treaty, Art. 115. The latter presumes judicial control under EEC Treaty Articles 164-88 in respect of "legality." Cf. discussion in Chapter IV at notes 62-68 and accompanying text.

³⁹ Compare ECSC Treaty, Art. 38, with EEC Treaty, Art. 173.

institutional federalism." By making the Court of Justice the authentic interpreter of Community law under Article 177, the EEC Treaty gives the Court the function of maintaining the full force of the Community policy-making jurisdiction. The cardinal importance of this judicial jurisdiction in a system employing decentralized, that is, Member State, application and enforcement can hardly be over-emphasized. Without the unifying influence of the Court of Justice, community law as applied by national tribunals could go off in at least six different directions.⁴⁰

Judicial Jurisdiction Sharing: The basic problem

Obviously, the "federal, constitutional" control exercised by the Court of Justice of the European Communities is extensive and, in the complex and flexible Community structure, politically significant. By virtue of its competence to oversee Community-Member State jurisdictional relationships, the Community Court, perhaps more than other aspects of the Community institutional system, is novel in the history of international organizations. The only judicial

⁴⁰ As was mentioned previously, the negotiation papers are mostly secret and hence there is no reliable evidence on the source of the interpretive jurisdiction. It was not contemplated by the Rapport des Chefs de Delegation aux Ministres des Affaires Etrangères (Spaak Report) in 1956.

While each country tended to translate the rationale for Article 177 into its own experience, there does not seem to be any major disagreement between the parties on the general purpose of assuring uniformity of law. Funke, De l'histoire de l'article 177 du traité instituant la C.E.E. et des exposés des motifs gouvernementaux a son sujet, 13 Sociale-Economische Wetgeving 516, 520-23 (1965).

forerunners which bear mentioning, the International Court of Justice and the Central American Court of Justice, are hardly comparable. Among other differences, the I.C.J. is not primarily concerned with overseeing international institutional structures, and where such competence is granted to the Court by organizational charters recourse is seldom made to it.⁴¹ The Central American Court was designed to control a nascent federal union, but the union existed only in spirit and, through the extrajudicial activities of the Court, quickly became a ghost.⁴² While elsewhere the growth of international adjudication lags behind other developments,⁴³ in the Communities the Court of Justice has been singled out as the aspect of the Community juridical structure which comes closest to transforming the whole Community legal system from an international to an autonomous one.⁴⁴

However, it would be too much to expect that, while the whole of the Community structure is permeated by complex adjustments of independent Community and Member-State jurisdictions, the Court should be exempted from the jurisdiction-sharing pattern. There is, in fact, a partial exemption

⁴¹ Jenks, *The Prospects for International Adjudication* 31-38 (1964).

⁴² Hudson, *The Permanent Court of International Justice* 42-70 (1943).

⁴³ Jenks, *op. cit. supra* note 41 at 113.

⁴⁴ Waelbroeck, *Contribution a l'etude de la nature juridique des communautés européennes*, in *Melanges Offerts à Henri Rolin* 506 (1964).

because the Court is institutionally autonomous - although it has certain relationships with the other Community organs and with member governments,⁴⁵ its decisional competence is exercised completely independently of the other institutions.⁴⁶ For all practical purposes jurisdiction-sharing in relation to the Community Court involves only the relationship of that Court with Member-State courts. Perhaps an insight into the basic question which must be answered about that relationship may be obtained by looking briefly at the structure of judicial jurisdictional arrangements in the oldest of the state federations.

An examination of the early history of the development of the American federal court system⁴⁷ reveals that at least one portion of the jurisdiction provided the federal courts in Article III, section 2 of the United States Constitution

⁴⁵ The Court is, of course, appointed by the Member State governments, ECSC Treaty, Art. 32, EEC Treaty, Art. 167, and judges' salaries are fixed by the Council, ECSC Treaty, Art. 29, EEC Treaty, Art. 154. It notifies the Parliament on certain matters, e.g., staff changes or in situations where both have responsibilities as in the modification of the ECSC Treaty (Art. 95, para. 4).

⁴⁶ But, see, the suggestion in Feld, *The Court of the European Communities* 56-58 (1964), that the personal biographies of the Community Judges reflect a certain predisposition toward "Community orientation" and that the difference between the selection procedure and the normal European, national procedures for producing judges reveals the comparatively "political" nature of the Court.

⁴⁷ See generally, Hutchinson, *The Foundations of the Constitution* 81-93, 197-220 (1928); Kelly & Harbison, *The American Constitution: Its Origins and Development* 1-166 (1948); Frank, Historical Bases of the Federal Judicial System, 13 *Law & Contemp. Prob.* 3 (1948).

is peculiarly significant in the context of a dual judicial and legal structure. It is the jurisdiction conferred extending "to all cases, in Law and Equity arising under this Constitution, the Laws of the United States and treaties made, or which shall be made, under their authority" and "to Controversies to which the United States shall be a Party." With the exception of "proprietary" suits, the former provision generally includes the latter and they may be thought of jointly as "federal question" jurisdiction - that is, jurisdiction to decide suits involving a claim of right based on federal law.

This jurisdiction is, in fact, the portion of the judicial provisions in the Constitution which most dramatically altered the federal-state balance of power under the confederation.⁴⁸ It was designed to solve a specific

⁴⁸ Jurisdiction in all cases "affecting Ambassadors, other public ministers and Consuls," and involving controversies "between a State or the Citizens thereof, and foreign States, Citizens, or Subjects" bears on external affairs which had been the domain of the national government in the confederation. Similarly, the jurisdiction provided in "Controversies between two or more States," and "between citizens of the same State claiming lands under Grants of different State" can be viewed as only strengthening the feeble jurisdiction previously exercised by national tribunals, as did the grant covering "all cases of Admiralty and Maritime jurisdiction." The diversity jurisdiction "between a State and Citizens of another State" and "between citizens of different States" was novel. However, its import was seen in relation to avoidance of local and/or class bias, rather than as an aspect of the broader federal-state balance of powers. See, Warren, *The Supreme Court and Sovereign States* 13 (1924); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Corn. L. Q.* 499 (1928); Friendly, *The Historic Bases of Diversity Jurisdiction*, 41 *Harv. L. Rev.* 483 (1928); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 *U. Pa. L. Rev.* 869 (1931).

problem that had occurred in relation to state courts. During the confederal period these courts had generally refused to recognize any rights not created by state law.⁴⁹ If no alternative forum for the enforcement of nationally-created rights were provided, the drafters of the Constitution had every reason to believe that they might do so again and, thus, thwart the Constitutional Convention in one of its prime purposes: the prevention of state interference with property rights and interstate trade.

Clearly the position of the courts was an integral part of the whole realignment of state and national powers effected by the Constitutional Convention, and the inclusion of "federal-question" jurisdiction in Article III was far from the end of the struggle between "federalists" and "state's rights" elements over judicial control of federal questions. Having won a battle, the "federalists" seemed to have lost the war by their inability to have included within the Constitution the establishment of any federal courts other than a Supreme Court. Federal questions were left in the first instance completely within the jurisdiction of state courts. Article VI, section 2, later a

⁴⁹ For specific examples see, e.g., United States v. Peters, 5 Cranch 115 (U.S. 1809); Penhallow v. Doane, 3 Dall. 54 (U.S. 1795). Madison was convinced that the general uncertainty surrounding enforcement of private rights in state courts contributed more to the movement for reform of the Articles of Confederation than did specific substantive weaknesses. 5 Writings of James Madison 27 (Hunt ed. 1904).

cornerstone of federal supremacy, confirmed this retention of jurisdiction by state courts. Indeed, the "supremacy clause" was proposed by an arch-defender of state's rights and was viewed at the time of the Convention as a state's rights victory.

However, it did not escape the notice of "state's-rights" champions in the state ratification debates that a simple act of Congress creating lower federal courts and investing them with full constitutional jurisdiction could completely alter this situation. The federal-question jurisdiction was attacked as being of "stupendous magnitude, without check or limitation,"⁵⁰ and the issue was carried over into the first session of Congress where state's rights supporters succeeded in excluding federal question jurisdiction from the jurisdiction accorded the lower federal courts established by the Judiciary Act of 1789.⁵¹ A majority of Congressmen could not be mustered to confer on federal courts the full measure of

⁵⁰ Madison and Marshall defended the provision in the Virginia Convention as essential to the proper functioning of the government, because it made the judicial power co-extensive with the legislative. They pointed out that its co-extensiveness was also its limitation, for the powers of Congress were admittedly limited. Surely they must have realized that their argument related only to cases arising under laws, not to the jurisdiction over all cases arising under the Constitution, but this was the only explanation ever given. See discussion in Forrester, The Nature of a "Federal Question", 16 Tul. L. Rev. 362, 364-67 (1942).

⁵¹ On why this jurisdiction was omitted from the Judiciary Act of 1789 see Frankfurter & Landis, The Business of the Supreme Court 11 (1928); Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 53, 65, 125 (1923).

constitutionally-provided jurisdiction until after the Civil War.⁵²

Without carrying this example any further, it is suggested that, notwithstanding divergent elements of time, place, history, sociology or economics, it indicates the basic constitutional issue in the relationship between judicial jurisdictions in any federal system - the respective competences of the central and regional judiciaries to decide questions relating to centrally-generated norms. If one assumes, as is the case with the United States and the European Communities, that the "federal" form is the result of a centralization, rather than of a decentralization of functions, there should be a pre-existing general jurisdiction in regional judicial organs. Thus, those courts will be competent to apply "federal" or "community" norms, either as directly effective law, or in deciding preliminary questions in litigation otherwise properly before them on purely "state-law" grounds.

In the Community setting, the question becomes one of how the provisions establishing Community jurisdictional competence regulate the powers of Community and national

⁵² Judiciary Act of 1875, 18 Stat. 470 (1875). The political impetus for and intent of this conferral is discussed in Bergman, Reappraisal of Federal Question Jurisdiction, 46 Mich. L. Rev. 17 (1947); Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 Univ. Pa. L. Rev. 639 (1942); Forrester, Federal Question Jurisdiction and Section 5, 18 Tul. L. Rev. 263 (1943).

The jurisdiction had been conferred earlier, Act of February 13, 1801, 2 Stat. 89, 92, but was repealed almost immediately by Act of March 13, 1802, 2 Stat. 132.

courts to determine questions of Community law. There are basically three types of possible jurisdictional allocations: (1) Exclusive jurisdiction in either Community or national courts. (2) Concurrent jurisdiction, that is, a litigant seeking a determination involving Community law may have a choice of Community or Member State forums. (3) Shared jurisdiction - and here this terminology takes on a technical meaning - that is, a division of jurisdictional powers whereby decisions of different types by both Community and national judiciaries may be required to settle a single controversy.

The first problem in an analysis of the relationship between Community and Member State Courts is then to describe the pattern and relative importance of exclusive, concurrent and shared judicial jurisdiction in the Communities in relation to the concrete situations wherein Community law may be applicable.

CHAPTER IV. The Availability of a Community Hearing on
Community Questions - The Importance of Shared
Jurisdiction

The general thrust of this chapter had best be revealed at the outset for we shall here be involved in an examination which could tend to obscure the major interest in a flood of necessary details. Hence conclusions first:

(1) There is virtually no concurrent jurisdiction in the Community and national courts. (2) There may be instances where there is an exclusive jurisdiction in national courts to determine questions which can properly be said to involve Community law. (This discussion will be pursued in greater detail in the following chapter.) (3) The shared jurisdiction of Article 177 provides a Community forum for numerous issues which are outside the exclusive jurisdiction of the Community Court.

The procedure by which these conclusions can be documented and explained is onerous. It involves an investigation of the major areas of the jurisdiction of the Court of Justice in order to determine what types of controversies involving Community law fall outside that jurisdiction and hence into the area of municipal court competence. These are the controversies which can actuate the sharing techniques of EEC Treaty, Article 177. Even this is not sufficient. In order to begin to appreciate the significance of the Article 177 jurisdiction as an aspect of the overall balance of Community-Member State competences, it is almost indispensable

that we include a concurrent investigation of the development of the Court's jurisdiction under the ECSC Treaty. In dealing with these problems, litigation involving Community law might be categorized under two general headings:

(1) suits raising issues concerning the legality of Community or Member-State action and (2) all other litigation involving a claim or defense based on Community law.

Issues of Legality

Issues of the legality of public acts may be raised either directly, that is, in litigation to which the allegedly offending institution is a party, or indirectly in suits involving third parties. One of the notable characteristics of the jurisdiction of the Community Court is the number of instances in which a suit nominally involving one party has as its basis a challenge to the legality of the action of another, not a party to the litigation. That the necessity for these indirect challenges to legality is a function of the complexity of the overall jurisdiction-sharing system of the Communities will become more apparent as we proceed.

A. Community Action

1. Under the ECSC Treaty

Direct challenges to the legality of Community acts, whether by means of a suit for annulment, declaration of illegality, or damages, are exclusively within the

competence of the Court of Justice.¹ This applies equally to litigation between Member States which might indirectly raise such questions.² Although the Treaty does not require that all litigation between Community organs be brought before the Community Court, it seems inconceivable that such suits should be brought before another forum.

We are left then with issues of the legality of Community acts raised in suits to which the Community is not a party and in which Member States are not principal parties on both sides of the litigation. Such cases cannot be brought before the Community Court except by means of a jurisdictional stipulation in a national law or, possibly, in a contract to which the Community was a party or which was undertaken on its behalf.³ As Article 41 presumes,⁴ jurisdiction over this type of litigation, that is, litigation

¹ See, ECSC Treaty, Arts. 40, para. 3 and 92, para. 3. However, the Court has indicated that this proposition may not be indisputable. *Société Antoine Vloeberghs S. A. v. High Authority*, Cases Nos. 9 & 12/60, VII Rec. 391, 426, 14 July 1961. The competence under Article 40 raises possibilities for positive or negative conflicts of jurisdiction with national courts. *Prieur, La Communauté Européenne de Charbon et de l'Acier* 171 (1962).

² ECSC Treaty, Art. 87.

³ ECSC Treaty, Arts. 42-43.

⁴ ECSC Treaty, Art. 41:

"The Court shall have sole jurisdiction to give preliminary rulings on the validity of conclusions of the High Authority and of the Council, where such validity is in issue in proceedings brought before a municipal court or tribunal."

between private parties or private parties and a member government, falls within the competence of national courts. However, that article also provides that any issue concerning the validity of Community acts must be certified to the Community Court. In such a situation the jurisdiction over the litigation is shared between the national and the Community courts⁵ in much the same manner as under EEC Treaty, Article 177.

But why should a party affected by Community action not be allowed to contest the measure directly? The answer to this question may be discovered only by an examination of the availability of appeal to private persons affected by decisions or recommendations of the ECSC authorities. Various aspects of this problem, particularly the recours en annulation, have received extensive doctrinal attention in other contexts. For that reason this discussion will be as brief as possible.

a. General Decisions

The parties primarily affected by the Coal and Steel Community are the coal and steel producers. The Treaty gives them the right to question the legality

⁵ Because they have little or no direct relation to the problem of control over Community law, sharing devices, e.g., Commissions rogatoires, Protocol on the Statute of the Court, Art. 26, repressive action by state courts against witnesses violating their oath in Community proceedings, Protocol, Art. 27, or execution of judgments by state courts, see, e.g., EEC Treaty, Arts. 187, 192, are not included in this discussion. See also, Article 1, Protocol on Privileges and Immunities.

of actions of the High Authority before the Court of Justice by means of suits for annulment,⁶ a declaration of

⁶ ECSC Treaty, Art. 33:

"The Court shall be empowered to decide upon applications, from one of the Member States or from the Council, to quash decisions and recommendations of the High Authority on the grounds of lack of powers, violations of basic procedural rules, infringement of the Treaty or of any rule of law relating to its implementation, or misuse of powers [détournement de pouvoir]. However, the Court's enquiry into the case may not cover the evaluation of the situation, resulting from economic facts and circumstances, in the light of which such decisions or recommendations were taken, except where the High Authority is accused of having misused its powers or of having plainly misinterpreted the provisions of the Treaty or any rule of law relating to its implementation.

The undertakings or associations referred to in Article 48 may, subject to the same conditions, make applications against decisions and recommendations concerning them that are individual in character or against general decisions and recommendations which they consider to involve a misuse of powers [détournement de pouvoir] affecting them.

The proceedings provided for in the first two paragraphs of this Article shall be instituted within one month from the date of notification or publication, as the case may be, of the decision or recommendation."

ECSC Treaty, Art. 35:

"Wherever the High Authority is required by a provision of this Treaty, or of regulations in implementation thereof, to take a decision or make a recommendation and fails to fulfill this obligation, the States, the Council or the undertakings and associations, as the case may be, shall have the right to bring the matter before it.

The same shall apply if the High Authority, when empowered by a provision of this Treaty or regulations in implementation thereof, to take a decision or make a recommendation, abstains from doing so and such abstention constitutes a misuse of powers [détournement de pouvoir].

illegality,⁷ or damages.⁸ Yet these enterprises and associations of enterprises do not have the presumptive interest of Member States or Community organs - their standing to sue is still based on the extent of their interest in the act complained of.⁹

Any system of administrative appeal must, of course, be based on some criteria of aggrieved interests.¹⁰ In the Community structure a basic distinction, apparently

6 (continued)

If at the end of two months the High Authority has not taken any decision or made any recommendation, an appeal may be made to the Court within one month, against the High Authority's implied refusal to take action which is to be inferred from its silence on the matter."

7 ECSC Treaty, Art. 36:

"Before imposing a monetary penalty or ordering a periodic penalty payment as provided for in this Treaty, the High Authority must give the party concerned an opportunity to comment.

Against monetary penalties and periodic penalty payments imposed under the provisions of this Treaty, recourse may be had to the plenary jurisdiction of the Court.

In support of such recourse and under the terms of the first paragraph of Article 33 of this Treaty, applicants may contest the legality of the decisions and recommendations which they are alleged to have contravened."

8 ECSC Treaty, Arts. 34 and 40.

9 ECSC Treaty, Art. 33(2).

10 See, e.g., the discussion of the interest requirements developed by the French Conseil d'Etat in Auby et Drago, II Traité de Contentieux Administratif 489-524 (1962).

based on necessary interests,¹¹ is made between the appealability of decisions that are "general" and those that are "individual." Enterprises and associations may seek to annul the latter on four extensive and overlapping grounds, but standing to sue for annulment of general acts can be based only on an allegation that the act contains a détournement de pouvoir with respect to the plaintiff.¹² Leaving aside for the moment the question of what this requirement might be held to mean in particular cases, it is clear that some allegedly "illegal" general acts can be attacked only on the suit of a Member State or of the Council. Failing a suit by one of these privileged parties, the illegal general act remains in force. However, its legality may yet be questioned in a suit contesting the validity of individual acts which implement it.¹³

¹¹ What the real consideration was is very difficult to determine. Compare, Bebr, Judicial Control in the European Communities 147 (1962); Gaudet, The Legal Systems of the European Community, in Proceedings of the 1960 Institute on Legal Aspects of the European Community 213 (1960); Lagrange, La Cour de Justice de la Communauté Européenne de Charbon et de l'Acier, 1954 R.D.P. 417, 423-24.

¹² ECSC Treaty, Art. 33.

¹³ ECSC Treaty, Art. 36. This article has been held to represent only a particular case of a general rule. Meroni & Co. v. High Authority, Case No. 9/56, IV Rec. 9, 26, 13 June 1958. The principle may even extend to certain non-acts, S.N.U.P.A.T. v. High Authority, Cases Nos. 32-33/58, V Rec. 275, 303, 17 July 1959, but not to individual decisions or to general acts having no legal connection with the act principally appealed. Macchiorlatti Dalmas e Figli v. High Authority, Case No. 21/64, XI-6 Rec. 226, 31 March 1965.

The legal protection thus provided is essential, but it does not eliminate issues of the validity of general decisions from litigation before national courts. It fails to do so because, although the Court seems to be moving toward a definition of "general" which would include only those acts which require further implementation in respect of their application to individual concerns,¹⁴ this definition does not equate "general" with "preparatory." From the time of its publication a general decision of the High Authority is directly effective within the national legal orders¹⁵ and gives rise to rights or duties which may be involved in litigation before national courts.

Given this possibility the manner in which the Court defines "general" and "détournement de pouvoir with respect to them" must certainly affect the number of such cases that might arise in national courts. With regard to the former the constant criterion has been an objective determination of the act's scope and nature - a decision is general because of its "quasi-legislative" nature and its normative affect ergo omnes.¹⁶ In practice this abstract test has meant that appeal cannot be limited simply by nomenclature, or by including general and individual

¹⁴ See, *Acciellere Fonderie Ferriere de Modena v. High Authority*, Cases Nos. 55-59/63 & 61-63/63, X Rec. 413, 9 June 1964.

¹⁵ ECSC Treaty, Art. 15, para. 3.

¹⁶ See, e.g., *Fedechar v. High Authority*, Case No. 8/55, II Rec. 199, 16 July 1956; *S.I.M.E.T. v. High Authority*, Cases Nos. 36-38/58 & 40-41/58, V Rec. 331, 352, 17 July 1959.

provisions in the same act.¹⁷ Moreover, decisions individual as to their addressees will not be considered as general with respect to third parties, and the manner of the adoption of a particular provision must be consistent with the exercise of a normative competence in order for it to be considered general.¹⁸ Moreover this objective approach has been mitigated by concern that the definition applied to a particular act should not shut off all avenues of appeal under the Treaty.¹⁹

However, the use and manipulation of abstract criteria is not consistently expansive of the Court's jurisdiction. It has, for example, foreclosed a line of approach that might have provided an opportunity for private parties to challenge the legality of all general acts before the Court of Justice. The reference is to the Court's rejection of Advocate General Lagrange's suggestion²⁰ that decisions which are general as to individual enterprises might be considered individual with respect to associations representing their collective interests.²¹ The Court's decision is

¹⁷ II Rec. at 224.

¹⁸ I. Nold K.G. v. High Authority, Case No. 18/57, V Rec. 89, 112-13, 20 March 1959.

¹⁹ See Conclusions of Advocate General Roemer. X Rec. at 463.

²⁰ See his Conclusions in Assider v. High Authority, Case No. 3/54, I Rec. 123, 172-73, 11 February 1955, and in Fedechar v. High Authority, Case No. 8/55, II Rec. 199, 253, 16 July 1956.

²¹ II Rec. at 224.

perfectly consistent with its general attitude toward the definition of general acts, but one might ask why associations have been given an independent right of appeal if their interests are to be so closely connected to those of their members.²²

The jurisprudential treatment of "détournement de pouvoir with respect to them" has been both expansive and contractive of the Court's jurisdiction. The Court clearly will not expand the concept of "détournement de pouvoir with respect to them" to include the whole of the other three grounds for annulment,²³ but neither will it admit that the

²² Indeed, it appears that the Court treats suits by associations simply as suits by an agent representing one or more individual, enterprise interests. See, e.g., *Assider v. High Authority*, Case No. 3/54, I Rec. 123, 139, 11 February 1955; *Wirtschaftsvereinigung Eisen-und Stahlindustrie v. High Authority*, Case No. 13/57, IV Rec. 261, 285, 21 June 1958. *Contra*, *Bebr*, *Judicial Control of the European Communities* 78 (1962).

²³ See, e.g., *Chambre Syndicale de la Siderurgie Française v. High Authority*, Cases Nos. 3 & 4/64, XI-8 Rec. 567, 8 July 1965.

There is, of course, some overlap between the grounds for annulment, see, e.g., *Hauts Fourneaux de Chasse v. High Authority*, Case No. 2/57, IV Rec. 129, 145-51, 13 June 1958, and this has been thought to raise a problem in suits where individuals allege a détournement de pouvoir against a general decision but can only prove some other ground on the merits. The question, then, is whether the Court may annul the challenged action on the proven ground or on a ground raised of its own motion. Valentine, the Court of Justice of the European Communities 116-17 (1965). The answer must be negative. When the non-existence of a détournement de pouvoir is established, the Court no longer has a basis for exercising jurisdiction. The situation is not comparable to those in which the Court has, in cases involving no jurisdictional problems, examined on its own motion a ground which was not alleged. E.g., *Netherlands Government v. High Authority*, Case No. 6/54, I Rec. 201, 220-21, 21 March 1955.

détournement must be of a special type, that is, disguising an individual decision as a general one.²⁴ The second proposition should, perhaps, have been admitted. Were the Court to find a special interest in the act, that is, that it affects an enterprise directly and individually,²⁵ it would probably have to classify the decision as individual and, hence, vitiated by the special form of détournement de pouvoir that it has held is not required.

b. Individual Decisions

The Court's rulings with respect to appeals against individual decisions have been so liberal in terms of the interest required that issues concerning the validity of such decisions should very infrequently appear before national courts. Broadly speaking, only a plausible and reasonably specific economic interest in the effects of a decision is required.²⁶ The decision need not affect the plaintiff in a manner peculiar to himself, nor is it necessary that it affect him directly. For example, a French enterprise has been held to have sufficient interest to attack a High Authority decision which authorized certain German transport tariffs that were applicable to the plaintiff's competitors in Germany.²⁷

²⁴ I Rec. at 139.

²⁵ See, Modena, X Rec. at 448.

²⁶ See, De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority, Case No. 30/59, VII Rec. 1, 58, 23 Feb. 1961. (Conclusions of Advocate General Lagrange).

²⁷ Siderurgie de l'Est v. High Authority, Cases Nos. 24 & 34/58, VI-2 Rec. 573, 598, 15 July 1960.

c. Recommendations

Perhaps the most interesting aspect of the case last-mentioned above, Siderurgie de l'Est v. High Authority, is that the enterprise was held to have an interest in the High Authority decision although juridically it was affected, if by anything, only by the national measures. (This would certainly be the case had the complaint been against the authorization of French measures directly applicable to the plaintiff.) The effect of "recommendations" on individuals is often accomplished by this sort of two-stage procedure, for they are used primarily as a means for coordinating Member State action in areas where the High Authority has no direct power of implementation.²⁸ Moreover, because recommendations only stipulate ends to be achieved,²⁹ their effect on persons other than their addressees seems even less direct than in the case of decisions addressed to Member States - that is to say, the competence and action of the addressee interposed between the Community act and those ultimately affected involves some element of discretion. Thus, in the context of appeal against individual recommendations, the failure to require "juridical directness" as an element of "standing" under Article 33 of the ECSC Treaty in the Siderurgie de l'Est case is especially significant. It seems to indicate that under the ECSC Treaty no distinction will be

²⁸ See ECSC Treaty, Chapters VII, VIII & X.

²⁹ ECSC Treaty, Art. 14.

made on this ground between appeals against decisions and those against recommendations, whether directed to enterprises³⁰ or to Member States.³¹

However, it has been suggested that a distinction, based on the maturity of the plaintiff's interest in the act, could be made between the allowability of appeals against decisions addressed to a Member State and of appeals against recommendations so addressed.³² Thus it might be held that an enterprise had no actual, present interest in a recommendation until the means by which the Member State will implement it are exposed. This is a possibility, but it is suggested that in order to show an interest the plaintiff should not be required to show that he is affected by existing national action - only that he is affected by the recommendation. Therefore, unless the Member State is in a position to choose measures in application of the recommendation which would exclude the plaintiff from their effective scope, his interest should not be considered only presumptive.

³⁰ The use of recommendations directed to enterprises should be infrequent. With few exceptions, e.g., Article 60(2)(a), the High Authority may act with respect to these parties by taking a decision. However, it is empowered to use a recommendation in place of a decision whenever it deems it advisable. ECSC Treaty, Art. 14.

³¹ It is possible to sustain an argument that there is no meaningful distinction between the effect on private parties of a decision or of a recommendation directed to a Member State. In either case state action is required before the Community policy can be applied to individuals. See, Savony et Juley, Rapport a l'assemblee Nationale (France), troisieme Legislature, session ordinaire, 1956-57, p. 169.

³² Bebr, op. cit. supra at 74.

Apparently the situation with respect to appeal against general recommendations parallels that described in relation to general decisions. The exception of illegality is, of course, a possible remedy should the maturity of the plaintiff's interest raise difficulties in this context.

d. Special Activity

The ECSC Treaty foresees that certain activity of the High Authority should affect persons other than producers of coal and steel, and those persons are given a right of appeal by special provisions of the Treaty.³³ Although the Court has not been required to decide whether such appeals are limited to the legal grounds contained in the general jurisdictional provisions,³⁴ its practice indicates that both these limitations and the expansive concept of interest developed thereunder are applicable.³⁵

It is, of course, also possible that the interests of parties other than coal and steel producers may be affected in instances where no right of appeal for annulment is afforded them.³⁶ To a certain extent this situation may be alleviated by a suit for damages. However, because

³³ ECSC Treaty, Arts. 63(2)(b), 65(4), 66(5), 80.

³⁴ *Friedrick Storke & Co. v. High Authority*, Case No. 1/58, V Rec. 43, 62, 4 February 1959.

³⁵ See, e.g., *I Nold. K. G. v. High Authority*, Case No. 18/57, V Rec. 89, 20 March 1959.

³⁶ ECSC Treaty, Arts. 33, 48, 80.

the possibility of raising issues of legality by way of damages is a problem common to both treaties, we shall delay its consideration until the appropriate point in our discussion of appeal against Community action under the EEC system.

e. Control d'opportunité

In at least one instance, the standard legal grounds are irrelevant to the assessment of the validity of High Authority action. When the Court exercises jurisdiction under Article 37, its control is based on the general criterion of the "justifiability" of the High Authority's action.³⁷ This fact has as its corollaries (1) the incapacity of private parties to make use of that jurisdiction

37 ECSC Treaty, Art. 37:

If a Member State considers that in a given case an action of the High Authority or a failure to act is of such a nature as to provoke fundamental and persistent disturbances in its economy, it may bring the matter before the High Authority.

The High Authority, after consulting the Council, shall, if there are grounds for so doing, recognize the existence of such a situation and decide on the measures to be taken to end it, under the terms of this Treaty, while at the same time safeguarding the Community's essential interests.

When application is made to the Court under the provisions of this Article against such a decision, or against an explicit decision or a decision to be implied, refusing to recognize the existence of the situation referred to above, the Court shall consider whether the decision is justified.

If the Court quashes the decision, it shall be the duty of the High Authority within the terms of the Court's judgment to decide on the measures to be taken for the purposes indicated in the second paragraph of this Article.

and (2) the exclusion of ordinary appeals for annulment against High Authority action taken pursuant to Article 37.³⁸ Nor, under these circumstances, does it seem likely that the taking of an illegal act could be considered a fault giving rise to damages in an action under Article 40. Query whether private parties might succeed in getting issues of appropriateness before national tribunals?

There is also the special case of appeal against the Assembly or the Council, which is limited to Member States and the High Authority and to grounds of incompetence and major violations of procedure.³⁹ However, since the Assembly never and the Council seldom⁴⁰ may take action creating individual rights and duties, these restrictions on the Court's jurisdiction should not result in any significant amount of litigation before national courts.

2. Under the EEC Treaty

The general structure of the jurisdiction provided in the Rome Treaty concerning direct challenges to the legality of Community action parallels that of the Coal and Steel Community Treaty. The language of Article 183, which provides that "Subject to the powers conferred on the

³⁸ Niederrheinische Bergwerks-Aktiengesellschaft v. High Authority, Cases Nos. 2-3/60, VII Rec. 261, 13 July 1961.

³⁹ ECSC Treaty, Art. 38.

⁴⁰ See, e.g., ECSC Treaty, Arts. 58(2) and 61(3).

Court of Justice by this Treaty, cases to which the Community is a party shall not for that reason alone be excluded from the competence of domestic courts or tribunals," indicates that where the Court has power, that power is exclusive. Jurisdiction is provided for suits directed against the Council or Commission and seeking annulment of acts,⁴¹ a declaration of their illegality⁴² and/or damages.⁴³

⁴¹ EEC Treaty, Art. 173:

Supervision of the legality of the acts of the Council and the Commission other than recommendations or opinions shall be a matter for the Court of Justice. The Court shall for this purpose have jurisdiction in proceedings instituted by a Member State, the Council or the Commission on the grounds of lack of jurisdiction, substantial violations of basic procedural rules, infringements of this Treaty or of any rule of law relating to effect being given to it or of misuse of powers (détournement de pouvoir).

Any natural or legal person may, under the same conditions, appeal against a decision directed to him or against a decision which, although in the form of a regulation or a decision directed to another person, is of direct and individual concern to him.

The proceedings provided for in this Article shall be instituted within a period of two months, dating, as the case may be, either from the publication of the measure concerned or from its notification to the complainant or, in default of this, from the day on which the latter learned of the said measure.

EEC Treaty, Art. 175:

Should the Council or the Commission in violation of this Treaty fail to act, the Member States and the other institutions of the Community may refer the matter to the Court of Justice in order to have the said violation placed on record.

No proceedings arising out of the said reference shall be heard unless the institution concerned has been called upon to act. If within two months of

As under the ECSC Treaty, the forced execution of Community decisions may be stayed only by the Court,⁴⁴ and Member States are bound not to raise issues of legality even indirectly,⁴⁵ in suits between themselves, before any other forum.

The possibility of raising issues of the legality of Community acts before national courts is again suggested by provisions for referral of preliminary questions of validity to the Court of Justice, viz, Article 177. However, because "sharing" is sometimes discretionary under

41 (continued)

being so called upon, the institution concerned has not made its attitude clear, the said proceedings may be brought within a further period of two months.

Any natural or legal person may bring proceedings before the Court of Justice, under the conditions laid down in the preceding paragraphs, on the ground that one of the institutions of the Community has failed to send him a formal document, such document not being a recommendation or an opinion.

42 EEC Treaty, Art. 184:

Where a regulation made by the Council or the Commission is the subject of legal proceedings, any of the parties concerned may, notwithstanding the expiry of the period laid down in Article 173(3), invoke the grounds set out in Article 173(1), in order to submit to the Court of Justice that the regulation in question does not apply.

43 EEC Treaty, Arts. 178, 215.

44 EEC Treaty, Art. 192.

45 EEC Treaty, Art. 219.

Article 177, paragraph 2 of the Rome Treaty, a different relationship is established between Community and national courts than was found in the context of the ECSC. This is an important change, but it is probably not the most significant one made by the EEC Treaty which affects jurisdiction sharing in relation to litigation involving questions of legality. Of greater moment is the shift in the importance of shared jurisdiction. In order to appreciate this shift we must examine the changes under the Rome Treaty in the Court's jurisdiction over litigation directly contesting the legality of Community action.

a. Appeal for Annulment

Article 173 of the EEC Treaty eliminates two of the restrictions found in the ECSC annulment jurisdiction. Appeal is extended to any natural or legal person and it may be pursued with respect to binding acts of the Council. Extension of the appeal procedure in this manner is a logical consequence of the different scope and internal structure of the general Economic Community, but other, more restrictive consequences also follow.

(1) Regulations

The first is that regulations are never appealable save by Member States, the Council or the Commission. Restriction of appeal against regulations is consistent with their increased legislative character under the more general provisions of the Common Market Treaty, at least in so far as this restriction applies to regulations

promulgated by the Council. On the other hand, it is arguable that some more flexible attitude toward standing might better comport with the regulatory competence of the Commission.⁴⁶ The difference between Council and Commission regulatory competence is particularly noticeable where, for example, the Commission exercises a competence delegated to it and circumscribed by a Council Regulation.⁴⁷ This flexibility has perhaps been introduced by the criteria which have been adopted for distinguishing "regulations" from "decisions."

(2) Decisions

A preliminary hurdle in all annulment proceedings under the EEC Treaty seems then to be the establishment that the act complained of is a decision. The formal criteria for this determination are straight-forward enough - decisions have addressees and are binding on those addressees alone, whereas regulations are of general application.⁴⁸ However, the jurisdictional competence under Article 173 presumes that decisions may be "disguised" as regulations and hence requires the abandonment of criteria based on formal elements.

⁴⁶ See Bebr, op. cit. supra at 52-3.

⁴⁷ See, *Sgarlatta v. Commission*, Case No. 40/64, XI-6 Rec. 279, 1 April 1965, for an attempt to remedy this particular problem by requiring that all acts by the Commission under these circumstances be considered decisions.

⁴⁸ EEC Treaty, Art. 189.

The Court has recognized this necessity and also that the same act may contain both regulatory and decisional provisions.⁴⁹ However, an abstract, material distinction is impossible. There is no material difference between a regulation governing, for example, external levies on pig meat, which takes into account the specific circumstances of each Member State market,⁵⁰ and identical provisions which might be contained in six separate decisions. Indeed, in certain situations decisions have been used interchangeably with regulations.⁵¹ Therefore, the Court has said that it must examine whether an act which seems to have application to situations abstractly determined and which has immediate legal effect is, in fact, of individual concern to certain persons.⁵² By formulating this criterion the Court seems to have overcome the problem of distinguishing between regulations and decisions by subordinating that determination to the further criterion of Article 173 that complainants be individually and directly concerned by the measure attacked.

Individual interest and its companion requirement, direct interest, are then the important problems

⁴⁹ Confederation Nationale des Producteurs de Fruits et Legumes v. Council, Cases Nos. 16-17/62, VIII Rec. 901, 14 December 1962.

⁵⁰ See, e.g., Regulation No. 94/65/EEC, 117 J.O. 1958 (1965).

⁵¹ See Waelbroeck, The Application of EEC Law by National Courts, 19 Stan. L. Rev. 1248, 1251-52 (1967).

⁵² VIII Rec. at 918.

in determining the extent of the annulment jurisdiction provided by the EEC Treaty. Because regulations are unappealable in principle and decisions addressed to the appellant present no difficulties, we shall assume in discussing these criteria that the questioned act is a decision directed to another person. In relation to such acts the appellant need not prove that the decision is in reality directed to him, that is, that the decision is only apparently directed to the named addressee.⁵³ He must only prove his interest in the decision. However, that interest is not established by proof of economic impact, as it might be under the ECSC Treaty. "Interest" or "concern" in the EEC context is understood in relation to the juridical effect of the decision.

(a) Individual Concern

"Individual" refers not to the nature of the act appealed, but to whether the complainant's position with respect to it singles him out as comparable to an addressee.⁵⁴ Exactly what is meant by this formulation is difficult to determine. The Court's rulings suggest that the closest one might come to devising a practical test would be to ask whether the Community institution knew or could have known at the time of taking the decision that it would, while operative, only affect certain specific parties

⁵³ Plaumann & Co. v. Commission, Case No. 25/62, IX Rec. 197, 235, 15 July 1963. (Conclusions of Advocate General Roemer).

⁵⁴ Id. at 223.

and no others.⁵⁵ If so, those parties are individually affected no matter to whom the decision is formally addressed. The restrictiveness of this requirement may be suggested by noting that the only case in which a decision directed to another has been held to affect complainants individually involved a Commission decision having retroactive effect.⁵⁶

(b) Direct Concern

"Directness" is a question not of the plaintiff's degree of concern, but of whether the act complained of requires application by an intermediate agency exercising discretionary competence before it alters the plaintiff's legal position.⁵⁷ The direct effect requirement is extremely important in the context of the EEC Treaty. As noted in the previous ECSC discussion, a requirement of juridical directness could eliminate individual appeal against all decisions directed to Member States.⁵⁸ Since the EEC institutions must carry on a significant portion of their operations through this medium, exclusion of third-party appeals in such cases might be expected to relegate a considerable proportion of litigation touching on questions of

⁵⁵ Compare, Alfred Toepfer v. Commission, Cases Nos. 106-107/63, XI-8 Rec. 525, 533, 1 July 1965, with Getreide-Import Gesellschaft v. Commission, Case No. 38/64, XI-6 Rec. 263, 270-71, 1 April 1965.

⁵⁶ Cases Nos. 106-107/63, XI-8 Rec. 525.

⁵⁷ IX Rec. at 238.

⁵⁸ See notes 29-32 supra and accompanying text.

the validity of Community decisions to national courts.⁵⁹

Jurisprudential treatment of this problem is sketchy. The Court has refused to say that, in principle, decisions directed to Member States cannot form the basis of suits by other natural or legal persons.⁶⁰ However, in all cases save one, the Court has avoided the problem of directness by finding that the plaintiff had no individual interest in the act complained of.⁶¹

Unfortunately, that one case⁶² is not particularly instructive. The suit involved a decision authorizing measures of safeguard taken by the German government pursuant to Article 22 of Regulation 19. The Commission argued that there could be no direct concern in this instance because the complainant was affected by the German measures which had already been taken and which the Commission only approved. The complainant's argument in favor of directness was based on the nature of the cooperation between the Commission and the German customs authorities, for it

⁵⁹ To date all litigation before the Community Court under Article 173 involving decisions directed to a party other than the plaintiff has concerned decisions directed to Member States.

⁶⁰ *Plaumann & Co. v. Commission*, Case No. 25/62, IX Rec. 197, 15 July 1963.

⁶¹ *Ibid.*; *Glucoseries Réunies v. Commission*, Case No. 1/64, X Rec. 811, 2 July 1964; *Getreide-Import Gesellschaft v. Commission*, Case No. 38/64, XI-6 Rec. 263, 1 April 1965.

⁶² *Alfred Toepfer v. Commission*, Cases Nos. 106-107/63, XI-8 Rec. 525, 532-33, 1 July 1965.

appeared that the measures of safeguard had been agreed upon between them before they were taken in order to correct a mutual mistake in the fixing of import levies.

The Court agreed that the Commission action affected the plaintiff directly, but on grounds of the peculiar provisions of Article 22 of the regulation rather than on the basis of the particular facts of the case. The Court reasoned that, because Article 22 makes approval, suppression or modification of safeguard measures immediately effective and because clearly the latter two actions would have the same force as the national measures replaced, it would be illogical not to give approval the same juridical effect. The Commission's decision was, thus, not a simple authorization but a "validation" of the national measures.

Advocate General Roemer disagreed.

Reiterating the position that he has consistently developed in previous cases,⁶³ the Advocate General found a distinction between suppression or modification of safeguard measures and approval of them perfectly plausible. The distinction is based on the absence of an interposed Member State discretion in the former cases. In the latter the national government remains free to make use of the Commission approval, to use only a part of the authorization or to decide not to take measures of safeguard after all.

⁶³ See his Conclusions at IX Rec. 238 and X Rec. 832.

Obviously, Herr Roemer's "discretionary" distinction, which has been supported by Advocate General Gand and by the Commission,⁶⁴ is a criterion of general application. The question then is what the Court's ruling indicates about its future attitude toward the "Roemer-rule." The answer is, probably, "nothing!" The Court's position may be read as consistent with either adoption or rejection of a criterion based on Member-State discretion, if it is admitted that the Court may have disagreed with the Advocate General's application of the standard in this particular case.

Thus, the Court may have agreed with the criterion, but concluded that Member-State competence to alter or abolish the approved measures did not change the existing situation in which those measures continued in force on the strength of the Commission's authorization. There was no question of whether the German government would use the approval; it covered provisions already temporarily in force.

Contrarily, the Court might have accepted the full force of Roemer's argument in relation to authorizations, but also have realized that it applied equally to a modification of safeguard measures. The latter action also leaves the Member State free to abolish the measures entirely. Thus the decision could be read as saying that, at

⁶⁴ XI-6 Rec. at 266-67, 274-75.

least in this context, discretionary competence attributable to the addressee Member State is irrelevant in a determination of whether the decision directly affects another. This sort of attitude could hardly be expected to be elevated to the status of a general rule, for it would be, in effect, a reversion to the ECSC criteria of interest. Even confined to the present situation it makes the administrative technique of Article 22 an attractive means for the transformation of national into appealable Community action.⁶⁵

This latter possibility will be further developed in the discussion of the distinction between Community and national law. For present purposes one need only point out that it is extremely doubtful that the Court has taken any general position on the question of the standard to be applied in determining whether decisions directed to Member States may be said to affect other persons directly. The Court has assiduously avoided making a declaration on this point, even in the face of a specific Commission request for a ruling.⁶⁶ It did so again in the instant case by relying on the specific circumstances of Commission activity under Article 22 of Regulation 19.

⁶⁵ Compare Regulation 19, Art. 22(2) with the standard safeguard procedure of EEC Treaty, Art. 115. The Regulation 19 system is used in other agricultural regulations. See, Reg. No. 20, Art. 15(2); Reg. No. 21, Art. 12(2); Reg. No. 22, Art. 12(2); Reg. No. 23, Art. 10(2); Reg. 13/64, Art. 16(2); Reg. No. 14/64, Art. 17(2); Reg. No. 16/64, Art. 16(2).

⁶⁶ XI-6 Rec. at 274.

From our point of view the importance of a ruling on this question, when it comes, is underlined by the Advocate General's rejection of the plaintiff's argument that there was special cooperation between the Commission and the national authorities in this instance.⁶⁷ Close collaboration with national governments in the preparatory stages of Community decisions is a normal procedure.⁶⁸ This operational fact of Community life indicates why Member States may fail to challenge irregular decisions and thus why it may be left to individuals affected by them to seek relief - relief which, if unavailable in the Community Court, must be pursued in national courts. In these cases control over issues of validity may be exercised by the Court of Justice only through the jurisdiction-sharing provisions of Article 177.

(3) Directives

There is no provision for appeal of directives by parties other than states or Community organs. It is improbable that the Court could be convinced to include these acts under the concept of "decision," for it has held that, at least in respect to the regulation/decision distinction, the categories of acts stipulated in the Treaty have

⁶⁷ XI-8 Rec. at 540-41.

⁶⁸ See Chapter II supra.

precise and mutually exclusive characteristics.⁶⁹ Even were "decision" in Article 173 given a generic meaning for purposes of appeal against directives, it seems very doubtful that natural or legal persons could make out a direct and individual interest in them. Of course, were such persons to establish the required interest in a nominal directive, the Court might find that in substance the act was a decision and appealable as such.

This could present special problems in cases where the Community is required to act by means of directives, but because of the competence exercised these acts may be only formally distinguishable from decisions.⁷⁰ For this reason the Court may hesitate to take a substantive approach to the classification of "directives." To admit the receivability of the suit in these special situations might be to deny the Community's competence to act. On the other hand, a directive which would, for example, clearly require the repeal of a specific national measure affecting certain individuals, lends itself to a finding of direct interest in somewhat the same manner as a detailed ECSC "recommendation." Thus, there is at least the possibility that individual appeal against directives might be allowed in a limited class of cases. For present purposes, however,

⁶⁹ Confédération Nationale des Producteurs de Fruits et Légumes v. Council, Cases Nos. 16-17/62, VIII Rec. 901, 917, 14 December 1962.

⁷⁰ See, e.g., EEC Treaty, Art. 13(2).

individuals appear capable of raising issues of the legality of directives only in litigation before national courts, and, again, the Community Court's control over those issues depends upon the shared jurisdiction.⁷¹

b. Declaration of Illegality

Article 184 of the Treaty of Rome mitigates the restrictions on appeal against regulations by allowing their legality to be questioned where that issue is relevant to litigation properly before the Court of Justice on other grounds. This, of course, involves making out jurisdiction in connection with a suit for annulment of a decision based on the regulation or, perhaps, in connection with a suit for damages.

Moreover, the text provides only that "regulations" may be contested in this manner. Some liberalization of this restrictive provision might be possible to include, as under the ECSC jurisprudence,⁷² internal decisions⁷³ and, perhaps, external ones,⁷⁴ if a legal connection between such decisions and the acts complained of could be established.

⁷¹ See Chapter V infra, pages 173-188.

⁷² See cases cited in note 13, supra.

⁷³ E.g., Decision of the Council Relating to an Action Program for the Common Commercial Policy, 90/62 J.O. 2353. (The decision is purportedly addressed to Member States, but much of it concerns activity to be taken by Community institutions.)

⁷⁴ E.g., Decision of the Council on Uniformization of the Duration of Commercial Agreements with Third Countries, 71/61 J.O. 1274.

An early draft of Article 184 used "general decisions" in place of "regulations,"⁷⁵ but this may simply reflect the use of ECSC nomenclature before a decision to change the denomination of administrative acts under the EEC Treaty had been taken.

The Court of Justice has also made it clear that Article 184 may not be employed as a substitute for or as a supplement to the jurisdiction sharing provisions of Article 177. The two cases involved in the development of this rule are of some interest.

In the first case⁷⁶ it appears that pursuant to a request of the German Government under Article 46 of the EEC Treaty, the Commission issued a decision allowing the German Government to impose a countervailing tax on imports of powdered whole milk. Germany implemented this authorization by administrative order and assessed the tax against the appellant importers. The latter appealed the assessment in the German courts. They also appealed to the Court of Justice, alleging that the Commission's decision, upon which the national order and assessment were based was invalid. Jurisdiction for this suit could not be based on the 'appeal for annulment' under Article 173 because the decision was not addressed to the appellants, nor was it of 'direct and

⁷⁵ Travaux Préparatoires, Traité Instituant la CEE, 381 (Cour de Justice, Luxembourg, 1962).

⁷⁶ Milchwerke Heinz Wohrmann & Sohn v. Commission, Cases Nos. 31 & 33/62, VIII Rec. 965, 14 November 1962.

specific' concern to them although addressed to another. Nor could the national administrative action, through the medium of which the Commission's decision did become of such concern, be made the basis of a suit before the Community Court under Article 173.

Instead, appellants invoked the somewhat ambiguous terms of Article 184, which provide:

Where a regulation of the Council or of the Commission is the subject of a dispute in legal proceedings, any of the parties concerned may, notwithstanding the expiry of the period laid down in Article 173, third paragraph, invoke the grounds set out in Article 173, first paragraph, in order to allege before the Court of Justice that the regulation concerned is inapplicable.

The "dispute in legal proceedings" relied upon was the importer's suit in the German courts. The basic issue presented by this claim was whether Article 184 should be interpreted only as extending the scope of review possible in an action properly before the Court under Article 173, or whether it should be read as granting an additional, compulsory, supervisory jurisdiction over national courts.

The Court acceded to the former view and dismissed the appeal. The decision was based, inter alia, on the respective competences of the national courts and the Community Court as established in Article 177 of the EEC Treaty and Article 20 of the Protocol on the Statute of the Court of Justice. The Court recognized that to allow the parties in a case pending before national courts to address themselves directly to the Court of Justice under Article 184 would

circumvent the discretionary power of referral given lower national courts under Article 177 and would nullify the national courts' control over suspension of their own proceedings in Article 177 cases, as envisaged by Article 20 of the Protocol.

In the second case⁷⁷ the attempt was to use Article 184 to expand the scope of a 177 referral. The national court had referred two questions of interpretation to the Court of Justice which sought to determine whether Article 52 of Regulation 3, which ostensibly is concerned with the social security of migrant workers, should be applied to persons who were not migrant workers, were not making claims on the basis of work-connected accidents, and were injured before the effective date of the Regulation. In its submission to the Court of Justice the defendant argued a further point, viz., that, if an affirmative answer were given to the questions of interpretation, should the Court of Justice not rule under Articles 173 and 184 that the Council had gone outside its powers in enacting the Regulation and that it was therefore inapplicable.

Interpreting this submission in its most plausible light, that is, as an attempt to use Article 184 in connection with a "dispute in legal proceedings" which was before the Court under Article 177, the Court of Justice held that under the latter provision parties to national litigation

⁷⁷ Hessische Knappschaft v. Maison Singer et Fils, Case No. 44/65, XI-11 Rec. 1191, 9 December 1965.

could make submissions, but they could not change the questions the national court had asked or introduce new matters which tended to render them pointless. The scope of a proceeding under Article 177 is to be determined from the questions submitted by the national court. However, having said this the Court of Justice went on to discuss the point of validity and to find that the Council had acted within its powers. Presumably questions of validity are too important to leave unanswered simply because the Court's jurisdiction does not require it to answer.

c. Suit for Damages

A discussion of the possibilities for appeal on questions of legality would not be complete without some mention of the jurisdiction of the Community Court to adjudicate controversies concerning the non-contractual liability of the Communities. A party suffering pecuniary injury may in such a suit raise issues of legality by claiming that the taking and executing of an illegal act involved, or was a part of administrative practices which involved, an administrative fault entailing the responsibility of the Communities. This is possible under both ECSC Treaty, Article 40 and EEC Treaty, Articles 178 and 215, the provisions of which have been harmonized by Article 26 of the Treaty Establishing a Single Council and a Single Commission of the European Communities.

The role of the suit for damages in supplying a community forum is somewhat different under the two treaties, although the applicable legal principles are apparently the same. In the EEC context the suit for damages might be employed as a limited means for circumventing the requirements of the annulment jurisdiction that the plaintiff have a direct and individual interest; whereas under the more liberal interest requirements of the ECSC annulment jurisdiction coal and steel producers should almost never need to resort to a suit in damages in order to raise questions of the legality of Community acts before the Court of Justice. The suit for damages becomes the refuge of the non-coal and steel producer under the Treaty of Paris when he is affected by an allegedly illegal Community act, or of a producer which is affected by High Authority action but not in the capacity which would give it standing under the annulment jurisdiction.⁷⁹

However, at this point in the development of the action for damages under the two treaties it is extremely difficult to predict the extent to which that action will be useful in broadening access to the Community Court on questions of the legality of Community acts. This is true because a definitive statement of the principles governing the suit for damages remains to be made. The existing jurisprudence gives only limited guidance.

⁷⁹ Société Antoine Vloeberghs S. A. v. High Authority, Cases Nos. 9 & 12/60, VII Rec. 391, 444-45, 14 July 1961 (Conclusions of Advocate General Roemer).

It is at least clear from two decisions under the Coal and Steel Treaty that the Court of Justice is willing to allow certain inroads on the annulment jurisdiction's restrictions. In Meroni & Co. v. High Authority⁸⁰ the Court made a clear distinction between the annulment and reparation jurisdictions⁸¹ and allowed a suit under the latter, although the act giving rise to the incidents complained of had not been annulled. Moreover, in Société Antoine Vloeberghs S. A. v. High Authority,⁸² a party which failed to qualify as an "enterprise" under Article 80 was allowed to bring a suit under Article 40 contesting the High Authority's inaction in the face of alleged treaty violations by a Member State. The Court rejected the High Authority's argument that the ground alleged was intimately connected with control of legality under Articles 33-35 and should be allowed only on the basis of those articles. The reasoning behind this rejection was that the object of suits under Article 40 is not suppression of the executive action but only reparation for damage resulting from administrative fault.⁸³ However,

⁸⁰ Cases Nos. 14, 16, 17, 20, 24, 26 & 27/60 & 1/61, VII Rec. 319, 333, 13 July 1961.

⁸¹ This distinction does not apply in the special circumstances of suits by Community employees. See discussion in Corton, La Concurrence des recours en annulation avec l'action en réparation des dommages: Rapport général in *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* 332-33 (1965).

⁸² Cases Nos. 9 & 12/60, VII Rec. 391, 14 July 1961.

⁸³ VII Rec. at 424-26.

this distinction was somewhat qualified by the Court's care in pointing out that it was not in this case called upon to decide whether the illegality of a positive act which had not been annulled could of itself be alleged as constituting such a fault.

This latter question seems to have been resolved by Plaumann & Co. v. EEC Commission,⁸⁴ decided under the provisions of the EEC Treaty. In that case the applicant based his claim for damages, in effect, on the alleged illegality of a decision directed to the German Government and coupled this claim with an appeal for annulment of the decision. The appeal for annulment was held inadmissible and the suit for damages unfounded. In relation to the latter claim the Court reasoned, "...an administrative act that has not been annulled cannot of itself constitute a wrong causing damage to those subject to that administration."⁸⁵

On the basis of these cases it would appear that a distinction has been made between complaints alleging illegal action and those, like the Vloeberghs complaint, alleging illegal inaction. Although the Court has not said this explicitly, the distinction is tenable. There is no prior demand procedure under ECSC Treaty, Article 40 and EEC Treaty, Articles 178 and 215 as there is within Articles 35 and 175 respectively of these treaties. Thus, it might be argued

⁸⁴ Case No. 15/62, IX Rec. 197, 15 July 1963.

⁸⁵ IX Rec. at 225.

that an appeal for damages resulting from inaction is not based on a tacit negative decision of the Community Executive. The admissibility of the Vloebergs claim thus becomes consistent with the Plaumann rationale. Moreover, Meroni is distinguishable from Plaumann because the faults alleged there did not arise from the decisions of the High Authority (actes administratifs), but from administrative practices (agissements materiels de l'administration) concerning their implementation. Hence that case did not involve an issue of legality in the sense that that phrase is here employed.

However, there are strong reasons to believe that the definitive answer has not yet been given. The above-quoted holding in Plaumann is not from the portion of the opinion which deals with admissibility; it is a ruling on the merits. This ruling may be read as indicating, not that the plaintiff may not allege the illegality of an extant decision in support of a claim of official fault, but that such an allegation is not enough. The claimant must prove fault in the sense of "maladministration."⁸⁶ This is not necessarily proved by a simple showing that the act complained of involves a treaty violation, a failure to comply with substantial procedural requirements, or even a détournement de pouvoir. (At this stage in jurisprudential developments, it is not possible to say precisely what proof is

⁸⁶ See, VII Rec. at 469 (Conclusions of Advocate General Roemer).

necessary to establish a faute, although it now seems to have been recognized that a faute lourde or "grave fault" is not required.⁸⁷) So viewed the Plaumann decision merely supports the juridical distinctness of the two types of suits, as enunciated in Meroni; it does not deny the possibility of their material connection in a particular case.⁸⁸ This seems to be the position of the Advocate General in Plaumann⁸⁹ although he thought that the failure to allege anything beyond illegality in the claim for damages resulted in failure to state a prime facie case and in the inadmissibility of the request.

The Court's further statement, that it could not by way of a recourse in indemnity make a ruling annihilating the juridical effects of a decision which had not been annulled,⁹⁰ might also be explained by reference to the facts of the case. It appears that the plaintiff's enumeration of damages was based solely and precisely on the amount of customs duties and taxes that he had paid as a result of the Authority's decision. This is to equate the effects of non-existence of the act in law with reparation for damage caused thereby. In so doing the plaintiff both seeks to substitute

⁸⁷ See, Firma E. Kampffmeyer v. Commission, Cases Nos. 5, 7, and 13-24/66, XIII-3 Rec. 317, 340, 14 July 1967.

⁸⁸ See, VII Rec. at 348 (Conclusions of Advocate General Lagrange).

⁸⁹ IX Rec. at 247. See also the similar submissions in Vloeberghs, VII Rec. at 450-53.

⁹⁰ IX Rec. at 225.

an action for reparation for an action of annulment and fails sufficiently to prove his damages under the former.⁹¹ Presumably some taxes and duties would have been due, even under a proper decision.

Some care has been taken to deal with this language in Plaumann because it is suspected that it will not be held to imply a general prohibition against suits for damages based on faults in respect of administrative acts which are not subject to attack by way of annulment.⁹² Significant consequences in other contexts militate against it. For example, such a rule might mean that illegal, individual decisions could not give rise to damages unless attacked under the annulment procedure within one or two months of promulgation.⁹³ This would be an extremely rigid approach and would strike a balance between administrative convenience and private rights that is far different from that established under the French administrative procedures⁹⁴ upon which at least ECSC Treaty, Article 40 was based.⁹⁵

It would also leave us with the Vloebergs case and the distinction between action and inaction earlier suggested,

⁹¹ Id. at 247-48.

⁹² Cf. Mathijsen, La fusion des voies de droit in Fusion des Communautés Européennes 91, 124-25 (1965).

⁹³ This limitation was explicitly proposed by the High Authority in Vloebergs. VII Rec. at 424.

⁹⁴ See, e.g., Laubadere, Traité élémentaire de droit administratif 474 (1957); Waline, Droit administratif 506 (8th ed. 1959).

⁹⁵ Lagrange, supra note 78.

which, although tenable, is far from satisfying. Parties contemplating the use of a suit in damages to contest inaction may certainly be expected to make an initial request to the Community Executive, as did the plaintiff in Vloebergs. If the Executive then fails to act, a tacit negative decision exists in all but name.

It is, therefore, suggested that persons unable to invoke the annulment jurisdiction of the Court of Justice under the ECSC Treaty may yet contest the legality of High Authority action before the Community Court to the extent that a ground of illegality can be made a part of suit for damages.⁹⁶ "At least" is, with the exception of the special cases above-mentioned,⁹⁷ coextensive with "at most." If the above analysis is borne out by subsequent developments, the possibilities for direct appeal on issues of the legality of Community acts might be expanded substantially under the EEC Treaty.

There is some irony in this conclusion because an action for damages will apparently, as in the case of annulment, require a "direct" and "individual" interest. However, these criteria may be distinguished from their meaning under Article 173. In the suit for damages these requirements relate to proof of causation and to the degree of the plaintiff's

⁹⁶ Contra, Cartou, La concurrence du recours en annulation avec l'action en réparation des dommages: Rapport général in Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften 339 (1965). But see, Blanchet, Id. at 347-49.

⁹⁷ See notes 33-36 supra and accompanying text.

concern. As under the ECSC annulment jurisdiction, the question of interest is factual rather than juridical. This, at least, is the view of Advocate General Roemer in perhaps the most comprehensive review of the elements of an action for "maladministration" available.⁹⁸ He would require only that the plaintiff be one of a small and well-defined group of persons affected,⁹⁹ not that he be alone prejudiced. Moreover, he would allow the interposition of Member State action in the chain of events producing the plaintiff's damage. "Directness" is a factual question of whether this interposition or the act of the Community organ can be said to be the preponderant cause of the prejudice suffered. These views are largely borne out in the Court's judgment in Firma E. Kampffmeyer v. Commission,¹⁰⁰ although the Court was there dealing with a decision taken under Article 22 of Regulation 19 which had previously been held susceptible of a private appeal in the Toepfer case.

Certain of the scrap-metal-fund cases, which have denied liability of the High Authority for acts of Dutch civil servants,¹⁰¹ were concerned with a similar problem -

⁹⁸ Cases Nos. 9 and 12/60, VII Rec. at 450, 474-75.

⁹⁹ Query how small and well defined the group need be. M. Lagrange seems to have seen no problem of "individuality" in a situation where all consumers of scrap metal were affected. See, Compagnie des Hauts Fourneaux de Chasse v. High Authority, Case No. 33/59, VIII Rec. 719, 765-67, 14 December 1962.

¹⁰⁰ Cases Nos. 5, 7 and 13-24/66, XIII-3 Rec. 317, 14 July 1967.

¹⁰¹ See, e.g., F.E.R.A.M. v. High Authority, Case No. 23/59, V Rec. 501, 517, 17 December 1959.

imputability of the acts of a person in one public authority to another public authority.¹⁰² However, those cases did not deny the possibility that the Community might be responsible for such acts, either because the national authority is acting as an agent of the Community institution or because the Community institution has committed a fault in its establishment or supervision of the program involved. The development of such principles in the EEC context would be of considerable importance. It would constitute a legal recognition of the close collaboration between Community and national administrations in implementing common policy and would open up a limited avenue of appeal for those unable to establish standing under Article 173. One wonders, for example, whether the plaintiff in Glucoseries Reunies v. Commission¹⁰³ might not have reached the merits of its claim had it, while avoiding the errors of the Plaumann pleading, based the suit on Articles 178 and 215.

3. Issues of Legality in the National Courts

At this point it is perhaps worthwhile to point out that the unavailability of a Community forum for the determination of an issue of legality of a Community act does not necessarily imply that a national forum will be available. Thus, to a certain, and abstractly undefinable,

¹⁰² See Waline, *Traité de Droit Administratif* 705 (8th ed. 1959).

¹⁰³ Case No. 1/64, X Rec. 811, 2 July 1964.

extent the limitations on the Court's jurisdiction that we are discussing bear only on questions of the general availability of legal redress in the Communities - not on the division of jurisdiction between Community and national judiciaries. The Community Court, it will be remembered, has exclusive jurisdiction in suits against the Community executives - that is, in all direct challenges to legality. National courts may only hear suits which raise such issues indirectly, and such litigation depends upon the existence of an appropriate setting. This would seem to require a contentious situation in which (1) one party has affected the other's interests by acting or refraining from acting on the basis of or in violation of an act of the Community executives and (2) the validity of the Community act can be made a relevant issue with respect to the first party's conduct.

A good example of how this might occur is provided by N. V. Internationale Credit-en Handelsvereniging "Rotterdam" v. Minister of Agriculture & Fisheries.¹⁰⁴ The plaintiff contested the assessment of certain export duties as in violation of EEC Treaty, Articles 12 and 16. The defendant claimed that the assessments were allowed by a Commission decision pursuant to Article 226 authorizing the institution of German import duties on certain products unless Dutch export duties were imposed. The plaintiff countered this argument by claiming that the Commission decision did not authorize

¹⁰⁴ Cases Nos. 73/63 & 74/63, X Rec. 1, 18 February 1964.

the Dutch duties and that even if it did it was invalid because vitiated by a détournement de pouvoir. The Dutch court, assuming as the plaintiff claimed that the national measures were barred by the Treaty articles, was clearly faced with the issues of (1) whether the Commission decision authorized the export duties and (2) whether it did so validly. Both questions were ultimately referred to the Court of Justice and were answered affirmatively.

The "Rotterdam" decision also demonstrates the greater importance of the referral or shared jurisdiction in providing a Community hearing on issues of the validity of Community action taken under the EEC Treaty. The case is typical of the manner in which issues concerning the validity of EEC decisions may be expected to arise in national courts.¹⁰⁵ It is less typical of ECSC practice because of the limited use of decisions directed to Member States and because of the greater opportunity for individual appeal against decisions directed to another. Although the case presents insufficient factual data to permit concrete analysis, it is certainly possible that under the ECSC rules the plaintiff in "Rotterdam" could have attacked the decision directly. Moreover, had the case concerned a directive to the Member State or a decision addressed to a private party, we know from the outline of jurisdictional practices sketched above that the chances would

¹⁰⁵ See also, *Firma C. Schwartze v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case No. 16/65, XI-10 Rec. 1081, 1 December 1965.

be very much greater under the EEC than under the ECSC Treaty that any issue of validity would have to be contested in litigation before a national court.

Cases might also be brought in national courts involving the legality of Community acts having no individual addressees, that is, regulations or general decisions. For example, since such norms are directly applicable to everyone in the Member States, including the Member State governments, a failure to abide by the Community norms may under the applicable national rules give rise to a suit for damages by persons prejudiced by such failure. The defendant might then allege the illegality of the Community norm and the lack of any duty on his part to conform to it. This situation has arisen in at least one lower court in Germany, which held invalid, without referral to the Court of Justice, Article 7 of Commission Regulation No. 102/64.¹⁰⁶

Again, the prospects for such situations to develop are greater in the EEC than in the ECSC. This follows both from the distinctions outlined above between the appealability of general acts under the two treaties and from the greater necessity for "regulatory" action within the general provisions of the Rome Treaty. Under that treaty, as we noted in Chapter II, the primary modes of action are through regulations or through decisions and directives addressed to

¹⁰⁶ Verwaltungsgericht Frankfurt/M., Decisions of December 12, 1966, II 2-986 and 987/66, Aussenwirtschaftsdienst 1967, 67-71; 5 C.M.L. Rev. 75 (1967).

Member States. Since these are precisely the situations in which individual appeal to the Community Court is most restricted and since the Member States and Community institutions that have agreed to these acts can seldom be expected to challenge their legality, it would, indeed, seem a rare case in which the Court of Justice should hear a direct challenge to the legality of an act of the EEC institutions, save in the instance of the individual decisions of the Commission. If effective control over the legality of other Community acts is to be exercised by the Community Court, it would appear that the provisions of Article 177 for the referral of questions of validity to the Court of Justice by national courts will be crucial to that task.

For this reason, one is somewhat at a loss to explain why Article 177 of the EEC Treaty fails to make mandatory the referral by national courts of all questions of the validity of Community acts as under ECSC Treaty, Article 41.¹⁰⁷ The limitation of the mandatory requirement to national courts of last resort is, of course, consistent with the general pattern of "jurisdiction" sharing in the EEC which often leaves implementation to national institutions. Yet, one cannot help feeling that this partition of competences

¹⁰⁷ During the course of negotiation Article 177 was drafted in three forms, none of which conforms exactly to the text as it appears in the Treaty. Two prototypes would have given the Court of Justice greater power than does the definitive article by making it "alone" competent to decide questions of interpretation or validity. Travaux Préparatoires, Traité Instituant la C.E.E. 376-77 (Cour de Justice, Luxembourg, 1962).

with respect to indirect, legal control of Community action is incongruous when considered in the light of the possibilities for such questions to come before national courts. Those possibilities include, not only the situations we have been discussing, in which limitations on the jurisdiction of the Court of Justice force a resort to national courts, but also cases in which individuals entitled to challenge the legality of acts directly fail to do so within the prescribed time limit. In this connection the decisions of the Commission in implementing the competition rules immediately spring to mind. If left unappealed, Commission decisions on manufacturers' distribution systems could give rise to considerable litigation in national courts indirectly challenging the decisions' legality.

B. Member State Action

The legality of Member State action may be questioned directly before the Court of Justice only on the suit of another Member State or of the Community executives.¹⁰⁸

A declaration of illegality in such cases obliges the state

¹⁰⁸ ECSC Treaty, Arts. 10, 88; EEC Treaty, Arts. 93(2.2), 169, 170, 180(a), 225(2). Article 16 of the Protocol on Privileges and Immunities of the ECSC is a special situation applicable only to Community staff. See, *Humblet v. Belgium*, Case No. 6/60, VI Rec. 1125, 16 December 1960.

There is a procedural distinction between the ECSC and EEC systems of control. Under the former the High Authority determines a violation and a suit contesting legality takes the form of a state action against the High Authority decision. The EEC Commission must in the first instance bring the question of a Member State's failure to fulfill its obligations before the Court of Justice for a determination.

concerned to take remedial action,¹⁰⁹ but it does not annul the action complained of.¹¹⁰ There are, however, indirect means by which these issues may be raised before the Community Court by other persons. These procedures are extremely important to the ensuring of respect for Community law. Although the Community executives are charged with effective implementation of Community norms, their decision to require strict legal compliance in a given situation may be affected by long-term policy considerations. Because political considerations must also be expected to affect the instigation of inter-Member State litigation, legal control is significantly affected by the ability of private parties who are aggrieved by allegedly illegal Member State action to obtain a Community Court ruling on these issues. Their ability to do so is intimately connected with the question of shared jurisdiction.

1. Indirect Challenge Before the Court of Justice

a. The ECSC Procedures

The primary, indirect method of relief for enterprises or associations affected by illegal state action is an appeal against the High Authority's failure to take action to end the violation. Since the High Authority's duty to act depends upon the existence of a failure to

¹⁰⁹ ECSC Treaty, Art. 86; EEC Treaty, Arts. 5, 171.

¹¹⁰ There is one exception to this rule: ECSC Treaty, Art. 10, para. 11.

fulfill treaty obligations,¹¹¹ the legality of the state action will necessarily be an issue in the suit.¹¹² This procedure requires a prior formal demand that the High Authority take specific binding action, and the suit is then against the tacit negative decision presumed from the Authority's failure to act within two months.¹¹³ Should the Authority act within this period but in a manner not conforming with the requesting party's demand, relief is available through the ordinary annulment jurisdiction.¹¹⁴ In either case the same interest requirements are made and the same grounds may be alleged, because the two procedures are complementary.¹¹⁵

The previous discussion of the Vloebergs¹¹⁶ case indicated a second indirect means of raising the legality

¹¹¹ Groupement des Industries Siderurgique Luxembourgeoises v. High Authority, Cases Nos. 7 & 9/54, II Rec. 53, 23 April 1956.

¹¹² See, Id. at 90-103.

¹¹³ ECSC Treaty, Art. 35.

¹¹⁴ See, De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority, Case No. 30/59, VII Rec. 1, 34, 23 February 1961; Chambre Syndicale v. High Authority, Cases Nos. 24 & 34/58, VI Rec. 609, 15 July 1960; Societa Industriale Acciaierie San Michele v. High Authority, Cases Nos. 5/11, 13-15/62, VIII Rec. 859, 882, 14 December 1962. (As these cases indicate, parties often have some difficulty determining what procedure to invoke.)

¹¹⁵ Meroni & Co. v. High Authority, Cases Nos. 21 & 26/61, VIII Rec. 143, 6 April 1962, makes it clear that they are strictly complementary; they may not be used interchangeably in respect of the same substantive question.

¹¹⁶ See note 82 supra and accompanying text.

of state action before the Community Court which applies to both ECSC and EEC situations: a suit for damages against the executive based on its failure to put an end to violative state practice. This raises the question of legality in the same way as the appeal en carence, that is, against a failure to act, but it will be remembered that additional elements must be proved in the damage suit.

The element of fault may be particularly difficult to establish, for complex questions of judgment are involved. The Court must consider, for example, what powers the executive has, the flagrancy of the violation, the possible consequences of allowing it to continue, and the scope of the executive's discretion.¹¹⁷ Perhaps for this reason, former Advocate General Lagrange has stated that fautes de service may be established only in connection with positive action.¹¹⁸

b. EEC Problems

The differences between the appeal en carence under ECSC Treaty, Article 35 and Article 175 of the EEC Treaty were reserved for treatment in this section because it is in connection with relief against illegal state action that the distinctions take on special significance.

¹¹⁷ VII Rec. at 467-74 (Conclusions of Advocate General Roemer).

¹¹⁸ Lagrange, The Non-Contractual Liability of the Community in the ECSC and in the EEC, 3 C.M.L. Rev. 10, 27 (1965).

Article 175 of the EEC Treaty provides:

"Should the Council or the Commission in violation of this Treaty fail to act, the Member States and the other institutions of the Community may refer the matter to the Court of Justice in order to have the said violation placed on record.

No proceedings arising out of the said reference shall be heard unless the institution concerned has been called upon to act. If within two months of being so called upon, the institution concerned has not made its attitude clear, the said proceedings may be brought within a further period of two months.

Any natural or legal person may bring proceedings before the Court of Justice, under the conditions laid down in the preceding paragraphs, on the ground that one of the institutions of the Community has failed to direct to him an act other than a recommendation or an opinion."

Article 35 of the ECSC Treaty provides:

"Wherever the High Authority is required by a provision of this Treaty, or of regulations in implementation thereof, to take a decision or make a recommendation and fails to fulfill this obligation, the States, the Council or the undertakings and associations, as the case may be, shall have the right to bring the matter before it.

The same shall apply if the High Authority, when empowered by a provision of this Treaty or regulations in implementation thereof, to take a decision or make a recommendation, abstains from doing so and such abstention constitutes a misuse of powers (détournement de pouvoir).

If at the end of two months the High Authority has not taken any decision or made any recommendation, an appeal may be made to the Court within one month, against the High Authority's implied refusal to take action, which is to be inferred from its silence on the matter."

When the two provisions are compared, the difficulty for individuals attempting to raise issues of Member State legality under the EEC article is obvious. Under the ECSC Treaty the private legal person need only show a request to act and a failure, in violation of the Treaty, to do so within two months. But Article 175 of the EEC Treaty requires an allegation that the Community institution has, in violation of the Treaty, failed to direct an act to the requesting party. Of course, in the context of a Member State violation the requested action would be directed to the Member State, and hence failure to address an act to the individual requesting party could not be in violation of the Treaty.

It is possible to read Article 175 in a manner which would yield results similar to those discussed under ECSC Treaty, Article 35. This is achieved by separating the requirements of illegal failure to act and failure to direct an act to the complaining party. Following this analysis the plaintiff might be required to show (1) a failure to act which is in violation of the Treaty and (2) a failure to address to him an act other than a recommendation or an opinion, as distinguished from a requirement that he show a failure, in violation of the Treaty, to address to him an act other than a recommendation or an opinion.¹¹⁹ Thus, a

¹¹⁹ Compare in this regard the interpretation placed on the dual criteria of "individual" and "concern" under ECSC Treaty, Article 33. See Conclusions of Advocate General Lagrange in *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority*, Case No. 30/59, VII Rec. 1, 68-69, 23 February 1961.

failure to answer the plaintiff's request when coupled with a failure to act in respect of a Treaty violation would give an individual standing to sue the Commission and thereby to raise indirectly the issue of the legality of Member State action.

This line of approach seems to have been attempted by the plaintiff in Alfons Lütticke GmbH v. EEC Commission.¹²⁰ The Lütticke firm requested that the Commission (1) declare in a decision that a certain German turnover equalization tax violated Article 95 of the Treaty, (2) proceed against the Federal Republic under Article 169, and (3) inform it of the decision adopted. The Commission informed the plaintiffs by letter that it did not share their view that the German measure was illegal. The plaintiffs then brought an action under Article 173 to have the Commission's decision annulled and, alternatively, an action under Article 175 complaining of the Commission's failure to take the requested action.

Both actions were ruled inadmissible. The Article 173 suit would not lie because under Article 169 the Commission has no power to take a binding act in respect of a Member State violation and, thus, the Court reasoned that there had been no act taken which was subject to annulment under Article 173. In so ruling the Court validated the previously expressed opinion of several commentators that a

¹²⁰ Case No. 48/65, XII Rec. 27, 1 March 1966.

major stumbling block to a suit of this type would be the difference between the procedures under ECSC Treaty, Article 88 and EEC Treaty, Article 169 rather than the differences between Articles 35 and 175 of those treaties.¹²¹ The alternative action under EEC Treaty, Article 175 was dismissed because a precondition to suit is the failure of the Community organ to "take a position" within two months of the request. Here the Commission had by its letter taken a position with respect to the issues raised by the plaintiff.

Technical objections may be raised to the Lütticke decision. Since Article 173 allows a suit for annulment against acts "other than recommendations or opinions", it would have been possible for the Court to hold that the letter to the plaintiffs was an act which did not fall within either of those categories. It could then have gone further to hold that the act was within the generic concept of a "decision" and therefore appealable by its addressee under Article 173.¹²²

The bases for the Court's brief interpretation of Article 175(2) may also be questioned. Is the Court saying that the Commission may avoid judicial review under Article 175 of its failure to act by taking an act which is

¹²¹ See comments by Lagrange in *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* 392 (1965).

¹²² No provision of the Treaty prohibits administrative action of a novel type, see Bebr, *Judicial Control in the European Communities* 52 (1962), and the Court has often said that doubts should be resolved in favor of appealability.

not reviewable under Article 173?¹²³ If so, not only individuals, but also the parties with "privileged" standing under the two articles will be incapable of invoking the jurisdiction of the Community Court in such cases.

What if the Commission had not taken a position? Is the Court willing to read the requirements of paragraphs one and three of Article 175 disjunctively, as was suggested above, such that the Lütticke type appeal would be admissible? One can only guess because the concern of the parties and the Advocate General in the case with the interpretation of Article 175 paragraph three receives not an echo in the Court's motifs.¹²⁴

2. The Importance of Shared Jurisdiction

Because the possibility of raising issues of the legality of Member State acts indirectly through the procedures outlined above depends on the scope of direct appeal against Community action, we arrive at basically the same conclusions stated with respect to issues of the legality of Community acts: the opportunity of those affected

¹²³ The Treaty certainly allows such a development. Articles 173 and 175 of the EEC Treaty are not complementary in the same sense as Articles 33 and 35 of the ECSC Treaty. See notes 110-112 supra and accompanying text. The parties and the grounds of appeal are different under the two articles and apparently the Article 175 appeal is not against a tacit negative act, but against the simple failure to take a position. See Valentine, op. cit. supra note 22 at 199.

¹²⁴ The only other case that has raised a similar question, *Société Rhenania v. Commission*, Case No. 103/63, X Rec. 838, 2 July 1964, was similarly inconclusive on this issue, because before trial the Commission acceded to the plaintiff's demands.

to raise issues of illegal state action in litigation before the Community Court is considerably greater under the ECSC than under the EEC Treaty. However, an examination of the effect on this problem of the jurisdiction-sharing articles - ECSC Treaty, Article 41 and EEC Treaty, Article 177 - reveals that the distinction between the two treaties lies more in where the principal suit must be tried than in the overall possibilities for having the issues of legality examined in some form by the Community Court.

a. EEC Treaty, Article 177

It is presumed that national judicial procedures will provide means whereby citizens and others subject to the jurisdiction of the state may question directly in national courts the legality of state measures sought to be applied to them.¹²⁵ As the "Rotterdam"¹²⁶ case illustrated, the question before the national court may be whether such state acts are illegal because in violation of Community law. Moreover, the Dutch Court's referral question

¹²⁵ See, e.g., *Societe B. P. Colussi v. Ministero, Consiglio di Stato (Italy)*, 7 November 1962, 88 (III) *Foro Italiano* 143 (1963), [1963] C.M.L.R. 133.

Such procedures exist to some degree in all the Member States, although in some of them review may depend upon whether the act is legislative or administrative. Even so, past practice indicates that national courts may allow questions of the conformity of Member State action with the treaties to be raised in situations where they apparently have no power to annul the national law. See *N.V. Algemene Transport-en Expeditie van Gend & Loos v. Netherlands Fiscal Administration*, Case No. 26/62, IX Rec. 1, 5 February 1963; *Costa v. E.N.E.L.*, Case No. 6/64, X Rec. 1141, 15 July 1964.

¹²⁶ See note 104 supra and accompanying text.

seeking to determine whether the Commission decision authorized the institution of export duties bore directly on this issue. Thus, by means of an interpretive renvoi the plaintiff was able to present his question of legality, at least in part, before the Community forum.

However, the question in "Rotterdam" could be considered as a necessary preliminary issue in deciding the question of the validity of the Community act. That case leaves open the question of whether a referral should be considered outwith the Court's purely interpretive jurisdiction under 177 because it is directed at a determination of whether certain Member State action is illegal.

This line of argument was suggested and rejected in the second decision handed down under the interpretive jurisdiction, N.V. Algemene Transport-en Expeditie van Gend & Loos v. Netherlands Fiscal Administration.¹²⁷ Briefly, the argument advanced was that the exclusion of individuals from the direct appeal procedures of Articles 169 and 170 evidenced an intent to prevent individuals from challenging the legality of national practices before the Community Court on the basis of Community law even where that challenge was limited to questions submitted by a national court. The Court answered this approach with the countervailing policy argument that, "The vigilance of individuals concerned with the safeguarding of their rights entails an efficient supervision added to that which Articles 169 and 170 entrust to

¹²⁷ Case No. 26/62, IX Rec. 1, 5 February 1963.

the care of the Commission and the Member States."¹²⁸ In other words, if the Court is to have a significant control over issues of the legality of state action, that control must be based on Article 177 as well as Articles 169 and 170.

This function of Article 177 was again brought out in the Lütticke case, for the Advocate General there reminded the plaintiff that dismissal of its claims under Articles 173 and 175 for lack of jurisdiction did not entail the loss of all possibility of Community legal protection. A suit could yet be instituted against the appropriate governmental agency in Germany, and in a proper case the question might then reach the Community Court by means of Article 177.¹²⁹

Indeed, as M. Gand certainly knew, the Lütticke counsel were not missing any bets.¹³⁰ They had already been litigating the question in the German courts and the questions of Community law involved were referred to the Court of Justice in a proceeding styled, Firma Alfons Lütticke GmbH v. Hauptzollamt de Sarrelouis.¹³¹ Of course, the Advocate General might have gone further to note that the

¹²⁸ Id. at 25.

¹²⁹ XII Rec. at 46-47.

¹³⁰ This same firm was one of the parties which had previously tried to use Article 184 in order to obtain direct access to the Court of Justice for a determination of the legality of a Commission decision which was involved in national legal proceedings. See note 76 supra and accompanying text.

¹³¹ Case No. 57/65, XII Rec. 293, 16 June 1966.

Community Court's interpretation of Community law under Article 177 may eliminate or sharpen the issue before the national judge of the compatibility of national acts with Community law, but it will not reach that question directly. Moreover, within the limits of the requirements of Article 177, the decisions as to when whether and what questions to refer to the Court of Justice are taken by the national court rather than by the parties.

We shall return to these problems of the limitations on the Article 177 jurisdiction in much greater detail in the chapters to follow. But, without getting into technical matters for which no proper foundation has yet been laid, we might at this point profitably consider several cases which have been decided under the Article 177 jurisdiction and which have involved issues of the legality of Member State acts, or in alternative and equally applicable terms, the relationship of Community and national law. A comparison of their treatment by the Court of Justice well illustrates the utility of the Article 177 procedure in handling politically difficult questions.

There are obvious political advantages in limiting declarations by the Community Court on questions of Member State violations of Community law raised by private parties to the Article 177 procedure. Any final statement of illegality will be made by a national court, and this is on the whole more acceptable to national governments. But, equally important is the flexibility with which the Court of

Justice can operate when answering questions referred by national courts, a flexibility which can result in both the strengthening of Community legal control and the avoidance of political fireworks.

Exemplary of this process is the Court's treatment of questions of national law involved in Article 177 referrals. As may be discerned from a simple reading of Article 177, the Court is there given no competence to interpret national law. Yet a recurrent problem in interpretive referrals has been the impact of Community norms on national legal rules. This is certainly to be expected in a general jurisdiction sharing system which relies in large part on the replacement or reorientation of national by Community norms as the technique for accomplishing common policy goals. In attempting to cope with these problems national courts need to know, not only whether Community law has direct effect, but also whether apparently applicable or conflicting national law is of the type affected by the Treaty or other Community legal provision in question.

German finance courts, for example, have been plagued by problems involving the distinction between "internal taxes" covered by Article 95 of the Treaty and "taxes having an effect equivalent to customs duties" which fall under Treaty Articles 12-17. Thus in Waldemar Deutschmann v. Federal Republic of Germany¹³² the national court asked,

¹³² Case No. 10/65, XI-8 Rec. 601, 8 July 1965.

Should Article 95(1) of the Treaty be interpreted in the sense that granting of import licences for agricultural products originating in other Member States cannot involve the collection of a tax by virtue of the law of 17 December 1951 relative to the collection of taxes by the Foreign Trade Agency of the Federal Ministry of Food, Agriculture and Forestry (BGBl.I, 969)?

To this question the Court replied, "A tax required for the delivery of an import license and without which importation is impossible does not fall within Article 95 of the EEC Treaty."¹³³ Obviously the Court was in this case willing to take the description of the operation of the German tax law offered by the national court into account in rendering its interpretation and, indeed, the Court ends its motifs by saying simply that "the response to the question posed by the Administrative Court of Francfort-sur-le-Main should be negative."¹³⁴ In thus tying the interpretation of Article 95 very closely to a particular national statute, the Court saw no infringement upon the province of the national judge.

Yet to read Costa v. ENEL¹³⁵ is to get an entirely different impression. The national judge asked a question similar to the one involved in Deutschmann, that is, whether certain Italian legislation and executive decrees instituting a state electricity system violated various articles

¹³³ Id. at 608 (dispositif).

¹³⁴ XI-8 Rec. at 608.

¹³⁵ Case No. 6/64, X Rec. 1141, 15 July 1964.

of the EEC Treaty, notably Article 37 on state trading monopolies. Far from answering by a simple "yes" or "no" the Court of Justice set forth the purpose of the self-executing portion of Article 37, to prohibit the introduction of any new discrimination among citizens of the Member States relating to the conditions of supply and marketing of goods, and then noted that,

It falls to the judge on the merits to determine whether this purpose has been effectively hindered, that is, whether a new discrimination between citizens of the Member States in conditions of supply and marketing results from the measure contested or will be a consequence of it.¹³⁶

The Court does not here explicitly deny its competence to evaluate the national scheme, at least in so far as it comprises an operative fact bearing on the context of the requested interpretation, but it does avoid all discussion of the national law even as an hypothetical "type."¹³⁷ Moreover, the Court in Albatros v. SoPeCo¹³⁸ seems very close to disavowing the competence it clearly exercised six months later in Deutschmann, when it says, "The Court cannot...respond to the questions asked in so far as they presuppose an examination of the petroleum import scheme established by the French law...."¹³⁹

¹³⁶ Id. at 1165.

¹³⁷ A procedure the Court has used frequently in dealing with the "facts" in Article 177 referrals. See further discussion in Chapter VI.

¹³⁸ Case No. 20/64, XI-3 Rec. 1, 4 February 1965.

¹³⁹ Id. at 9.

Does the Deutschmann case then stand alone? Far from it. In a number of the social security cases (with which the Article 177 jurisprudence has been inundated), for example the Dekker case,¹⁴⁰ the Court of Justice has taken a similar approach. On what ground then are Costa and Albatros distinguishable from Deutschmann and Dekker? The answer inevitably is on many grounds.

For one thing considerable political tensions were present in Costa and Albatros. In the former the Italian Government attacked the Court's jurisdiction and, indeed, the legal underpinning of the Community, by its insistence that the EEC Treaty had become national law by incorporation and that only questions of national law were involved before the Milanese court. The Court of Justice rejected this argument on the basis of the independence of the Community legal order from national legal orders, a rationale which first appeared in the Bosch¹⁴¹ case, the first case referred to the Court under Article 177, and was carried forward in van Gend & Loos v. Netherlands Fiscal Administration.¹⁴² While basically protective of the Community Court's jurisdiction, this separate-legal-order rationale also carries with it a strong impetus toward circumspection in confusing national and Community law issues. The Court can thus be seen to be going

¹⁴⁰ Case No. 33/65, XI-10 Rec. 1111, 1 December 1965.

¹⁴¹ Case No. 13/61, VIII Rec. 89, 6 April 1962.

¹⁴² Case No. 26/62, IX Rec. 1, 5 February 1963.

in two directions at once; it strongly affirms its interpretive jurisdiction and the duty of national courts to make referrals on questions of Community law, while avoiding any implications of encroachment on the domain of the national judge as interpreter of national law.

Again in Albatros v. SoPeCo political factors, and perhaps the argument a contrario from Articles 169 and 170,¹⁴³ seem to have resulted in a very cautious approach toward dealing with questions of the legality of Member State acts in the context of an Article 177 referral. The suit was brought in Italy by an Italian firm against a French firm. The complaint alleged a breach of the latter's contractual obligation to deliver a quantity of petroleum products. It appears that the respondent's defense was based, inter alia, upon force majeure, the denial to it of an import license by the French authorities, and, alternatively, substantial error of law, that is, SoPeCo claimed that this denial, based on the French law and regulations governing the wholesale importation of petroleum, violated certain articles of the EEC Treaty and that it had presumed that the French provisions would no longer have effect.

At the parties' request the Italian Court referred four questions of interpretation to the Court of Justice concerning the effect of Articles 30-37 of the EEC Treaty on the French import rules. The questions clearly

¹⁴³ This argument was advanced both in Costa, X Rec. at 1152, 1157-58, and in SoPeCo, XI-3 Rec. at 6, 8.

raised issues of the validity of the French laws, and the French government submitted comments questioning the Court's jurisdiction to deal with them under Article 177.

The questions were poorly drafted and, in any event, had to be rephrased in order to bring them within the Court's jurisdiction to interpret the Treaty. However, the Court went further than this process required. It combined all four questions, excluded parts of them that were unnecessary and interpreted the chapter of the Treaty as a whole, although the articles had been mentioned in separate questions. This approach is a considerable departure from previous practice¹⁴⁴ and we may well wonder what impelled the Court to take it.

The major reason that appears from the decision is that, considering the situation confronting the Italian Court, a simple ruling on the juridical effects of the provisions in Chapter 2 of the Treaty would satisfy the requirements of the national judge and apply equally to all four of his questions.¹⁴⁵ However, as the Advocate General reminded the Court, the importance of its interpretation is

¹⁴⁴ Compare, for example, the Court's treatment of the referred questions in Costa, X Rec. at 1161-1165. Admittedly, the articles involved in the present case lend themselves more to a consolidated treatment than did those submitted in Costa, but in that case the Court divided a unitary question, which doubtless could have been given a single general answer, into separate issues of interpretation concerning each Treaty article mentioned. One would expect a fortiori that separate questions would invite separate interpretations and, indeed, in no other referral have the questions been so consolidated.

¹⁴⁵ XI-3 Rec. at 10.

expected to go beyond the principal case,¹⁴⁶ and the comments submitted by the Commission and three Member States raised a number of issues that were within the scope of an interpretation based on the referral questions.¹⁴⁷

Why then the limitation? Certain language in the opinion suggests a second answer. Immediately after giving its general ruling on the effects of Chapter 2, the Court notes that it always remains open for a party aggrieved by national practice to bring suit in its own national courts. Moreover, that in a proper case, submission to the Court of Justice under Article 177 may be obtained in order to secure interpretation of the complex provisions of Chapter 2 and their interrelationships.¹⁴⁸ Apparently, the Court does not care to undertake a detailed examination of these provisions, possibly bearing on the legality of one Member State's laws, in the context of a renvoi by the courts of another state.

This conclusion is re-enforced by a reading of M. Gand's submissions. If the Court had pursued its usual procedure of detailed and distinct resolution of the questions submitted, it could hardly have avoided, as the Advocate General could not, a discussion of the place of the French petroleum-import system, or systems like it, under the Treaties.¹⁴⁹ Moreover, there was again in Albatros a

¹⁴⁶ Id. at 12.

¹⁴⁷ Id. at 407.

¹⁴⁸ Id. at 10.

¹⁴⁹ Id. at 19-20.

direct attack on the Court's jurisdiction, this time by the French Government, and, as we shall see in Chapter V, the case was connected with similar litigation in the French courts which had not been referred for interpretation. The relationship of the Court of Justice to French courts was thus also at stake. No such specific political factors impinged upon the Court's deliberations in cases such as Deutschmann and Dekker.

There were additionally considerable differences in the subject matter involved in the two sets of cases from the standpoint of a recognizable political commitment to the application of common policy. The major decision to facilitate free movement of workers by rationalizing the application of national social security schemes antedates the EEC Treaty¹⁵⁰ and a commitment to the elimination of discriminatory taxation must be presumed if even the skeleton of a common market in goods is to be established. By way of contrast, the studious obscurity of Article 37 on state trading monopolies reflects a lack of agreement among the Member States concerning the proper place of such organizations in the Common Market.¹⁵¹ Indeed, no Community institution is given more than recommendatory power in this area.

¹⁵⁰ See further discussion in Chapter VI at note 68 and accompanying text.

¹⁵¹ See generally, authorities cited infra, Chapter V at note 85.

An interesting parallel might here be drawn between SoPeCo and the ECSC practice under Articles 35 and 88. There seems little doubt that in the context of the Coal and Steel Community the party aggrieved by the French petroleum regulations would have had no difficulty in obtaining a Community hearing on their legality by the simple expedient of charging the executive with failure to put an end to a treaty violation. In such a case the Court of Justice would have little room for maneuver. Properly framed pleadings would require that issues be faced squarely, no matter how political.

From the standpoint of strict legality the ECSC system is superior, but in the EEC context the jurisprudential developments which have shifted individual complaints of Member State Treaty violations to national courts in the first instance and to the Community Court only by way of Article 177 are probably more beneficial than harmful. More direct procedures for individual redress would surely short-circuit the processes of political accommodation which keep the Community viable. Moreover, there is the basic danger that instead of "legalizing" the political controversies, such procedures would merely "politicize" the legal organ and thereby undermine the whole basis of the developing respect for legality in the Community system. In this context one hardly knows whether to chide the Court for inconsistency in dealing with the Article 177 referrals or to applaud the dexterity with which the potentialities of the shared

jurisdiction have been exploited to avoid irreconcilable political conflicts. We shall have more to say about this later, but it should be added that, while we have here emphasized judicial restraint when dealing with questions involving national law, the Costa case is still the leading case on the "supremacy" of Community law.¹⁵²

b. ECSC Treaty, Article 41

Article 41 provides only for a compulsory referral by national courts of issues involving a question of the validity of acts of the executive organs of the ECSC. There is no provision for preliminary referral of the interpretation of these acts or of the Treaty. Thus, it is only in the "Rotterdam"-type case, that is, where the legality of state action can be made to depend upon the validity of Community acts, that the ECSC referral jurisdiction provides a means for raising issues of the legality of state action before the Community Court. In practical terms this probably depends upon the resourcefulness of counsel in establishing some concrete link between the legality of state action and the validity of Community action. If there is no such link, either the national court will consider the validity question irrelevant or the Court of Justice when ruling on validity will not be considering issues which bear on the question of the legality of state action. But, of course, as we have just noted there is much less need for referral as a

¹⁵² See discussion in Chapter V at notes 132-134 and accompanying text.

basis for obtaining a Community Court hearing on these issues in the ECSC than in the EEC.

Issues Not Involving Legality of Public Acts

The Court of Justice, of course, has no "Community question" jurisdiction on the American "federal question" model. The tortuous, indirect methods described above of litigating grievances involving the validity of Community or Member State acts attest to the difficulties this presents. A table of the real interests involved in ten years of litigation under the Coal and Steel Treaty reveals five categories of cases: (1) Enterprises v. High Authority, (2) Member State v. High Authority, (3) Enterprise v. Enterprise, (4) Enterprise v. Member State and (5) Member State v. Member State.¹⁵³ In terms of formal parties all of these suits have come within categories one and two, for categories three and four are not within the Court's formal grants of jurisdiction and there have been no intergovernmental cases.

Outside the realm of validity cases, the lack of a general competence to decide cases involving a claim based on Community law means that the Court has very little jurisdiction to decide substantive controversies. With the exception of inter-state suits, suits contesting the imposition of penalties, Community staff disputes and suits for damages resulting from Community activities, the Court's jurisdiction

¹⁵³ Scheingold, *The Rule of Law in European Integration* 270-71 (1965).

to decide issues of Community law is based almost wholly on shared jurisdiction - the referral to it of such issues by national courts in the form of request for interpretation of the treaties or of administrative acts.

Admittedly, a general jurisdiction to hear suits involving rights based on Community law, even where there is no specific jurisdictional grant, is suggested¹⁵⁴ by the Court's statement in Humblet v. Belgian State that

"[I]l est normal de supposer qu'un droit matériel a comme corollaire la faculté du bénéficiaire de s'en prévaloir lui-même par une action en justice, plutôt que par le truchement d'un tiers, c'est-à-dire de l'un des États membres."¹⁵⁵

However, it is, to say the least, extremely doubtful that this language properly reflects the Court's overall attitude to its own jurisdiction. The only question in Humblet, a case involving infringement of rights granted by the Protocol on Privileges and Immunities of the ECSC, was whether the Community employee could sue in his own name, for the Protocol gave the Court exclusive jurisdiction over any dispute involving its interpretation or application.

The lack of a general jurisdiction to hear all suits based on a claim of right based on Community law makes the omission of provision for an interpretive referral in Article 41 of the ECSC Treaty especially significant. With the exception of questions concerning the conformity of agreements

¹⁵⁴ Migliazza, Der Gerichtshof und nationales Recht: Hauptreferat in Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften 145 (1965).

¹⁵⁵ Case No. 6/60, VI Rec. 1125, 1149-50, 16 December 1960.

and concentrations with Article 65, it leaves in the hands of national authorities the interpretation of all ECSC provisions relevant to suits between private parties.

Several methods for remedying this defect, without attempting a treaty revision, have been proposed. It has been suggested, for example, that any interpretation of an executive act by a national court which concerns the extent of that act's application raises a potential question of its validity. Thus, a compulsory referral on the question of "validity" would be required whenever there was a question of "interpretation."¹⁵⁶ Apart from other weaknesses this solves only half the problem. Jurisdiction to interpret the ECSC Treaty is yet lacking. This difficulty is overcome by a second solution,¹⁵⁷ which would imply from the statement in Article 31 of the Court's general function "to ensure the rule of law in the interpretation and application of the present Treaty and of the regulations for its execution" a preliminary jurisdiction to interpret the ECSC Treaty. However, this suggestion is made suspect by the inclusion of almost identical language in the Rome Treaties,¹⁵⁸ along with the specific grants of jurisdiction to make preliminary rulings. If these general statements of function are additional

¹⁵⁶ Bebr, op. cit. supra note 11, at 182.

¹⁵⁷ Valentine, op. cit. supra note 23, at 15, n. 8. Dr. Valentine suggests the solution, but he apparently does not support it. Id. at 112.

¹⁵⁸ EEC Treaty, Art. 164; EURATOM Treaty, Art. 136.

grants of jurisdiction, the purpose of the carefully defined specific grants of jurisdiction becomes obscure.

The Member States could, of course, confer a referral jurisdiction on the Court by passing appropriate laws at the national level,¹⁵⁹ but the question, given the present status of the law, is what the Court should do if asked by a national tribunal to interpret the ECSC Treaty. In one set of circumstances the Court has decided that it may do so.¹⁶⁰

The facts of the case are of some comic interest. The plaintiffs brought suit in a district court of Luxembourg during the few hours of one day of the year in which the defendants were not covered by the immunity from suit accorded Luxemburgois parliamentarians while Parliament is in session. However, the defendants were also members of the European Parliament and claimed that the gap in their national parliamentary immunity was filled by the immunity guaranteed them under Article 9 of the Protocols on Privileges and Immunities of the respective communities. This claim required a determination of whether the European Parliament was in session on the particular date involved and resulted in a referral to the Court of Justice under Article 177 of the EEC Treaty and Article 150 of the EURATOM Treaty for an

¹⁵⁹ ECSC Treaty, Art. 43.

¹⁶⁰ Wagner v. Fohrmann, Case No. 101/63, X Rec. 381, 12 May 1964.

interpretation of the concept of "in session" in the treaties.¹⁶¹ Because the Parliament is an institution common to the three communities, this question involved an interpretation of the ECSC Treaty and the Protocol on Privileges and Immunities of the Coal and Steel Community.

In his submissions Advocate General Lagrange openly favored reading Article 31 of the ECSC Treaty as containing a general competence to interpret the Treaty, but concluded that a decision on that "delicate" question was not required because the ECSC provision was perfectly clear and did not require interpretation.¹⁶² From the reasons given by the Court for its judgment, it would appear that neither of these opinions was accepted. The Court seemed to solve the jurisdictional problem on the eminently practical basis that, because the sections of the protocols to be interpreted were identical under all three treaties and because they and the Treaty provisions in question applied to a common institution, the treaties and protocols should all be interpreted together.¹⁶³ This result was reached even though it was necessary to give separate treatment to Article 22 of the ECSC Treaty.¹⁶⁴ However, among the considerations listed in

¹⁶¹ ECSC Treaty, Art. 22; EEC Treaty, Art. 139; EURATOM Treaty, Art. 109.

¹⁶² X Rec. at 404.

¹⁶³ Id. at 394-95.

¹⁶⁴ Id. at 396, 398.

the formal judgment (dispositif) is Article 31 of the ECSC Treaty.¹⁶⁵

Did the Court accept M. Lagrange's argument? It is difficult to say, but even if no theoretical ground was broken, the merger of the executives of the three communities might allow some development of the restricted sort of ancillary jurisdiction here employed.¹⁶⁶ On the other hand it is clear that the "common-institution, identical-provision" rationale will be of limited utility in putting ECSC interpretive questions before the Court of Justice.

Conclusions

The above analysis reveals that the competence of the Court of Justice to decide issues of Community law is based on exclusive jurisdiction over certain classes of litigation and, outside the limits of that exclusive territory, it rests on procedures for sharing jurisdiction with national courts. Moreover, it has become increasingly clear that the latter procedures are extremely important from the standpoint of providing a Community forum for questions of Community law. In relation to the validity of Community acts the provisions for shared jurisdiction fill lacunae resulting primarily from restrictive interest requirements. Where

¹⁶⁵ X Rec. at 397.

¹⁶⁶ Development of this type would still be necessary because Article 30 of the Treaty Instituting a Single Council and a Single Commission for the European Communities continues the division of the Court's competence under the three treaties and specifically makes it competent in accordance with ECSC rules over provisions of the Treaty relating only to the ECSC.

the legality of Member-State acts is in question, Article 177 may provide the only means under the EEC Treaty whereby issues of the non-fulfillment of Treaty obligations raised in suits by private parties may come before the Community Court. Finally, outside these two areas, shared jurisdiction becomes the almost exclusive means through which Community judicial jurisdiction can be exercised over the multifarious and increasing instances of litigation involving the interpretation of Community law.

The general reason why the shared jurisdiction becomes so important in the Community context may be explained by what the Community jurisdictional system lacks - concurrent jurisdiction. If we look again at the situation of the United States' judicial system, we find that perhaps its principal characteristic is a presupposition of concurrent jurisdiction in state and federal courts over suits involving federal questions. This has allowed the development of a system whereby a federal court determination of federal law may be obtained through an original action in federal court, removal of an action begun in state court or by review of a state court determination,¹⁶⁷ notwithstanding the preponderance

¹⁶⁷ The appellate jurisdiction of the federal Supreme Court over cases coming from state supreme courts rests on no firmer constitutional foundation than this presumption of reciprocal concurrence, and it was for some years challenged by the state courts. See discussion in Wagner, *The Federal States and Their Judiciary* 310-15 (1959).

of state law issues in the litigation.¹⁶⁸ As we noted earlier, the completion of this system allowing a unified development of federal law took some time and was not accomplished without difficulty. It is a system that suits a nation unified politically.¹⁶⁹ The European Communities are patently not so unified, but at the same time the logical necessity of a unified development of Community law cannot be denied. Unless Community law has the same effect throughout the Community, the economies of the Member States will not be integrated. These competing considerations have resulted in a delicate, if sometimes inexplicable, balance between the jurisdictions of the Community Court and national courts over questions of Community law - a balance which M. Gaudet, Director General of the Community Legal Services, has said quite plainly is difficult to justify logically.¹⁷⁰

The limitations on the exclusive jurisdiction of the Court of Justice make it plain that that jurisdiction cannot be the unifying factor. The effects of Community law on

¹⁶⁸ The U.S. system is here, of course, described in very general terms. There are exceptions to the concurrent state court jurisdiction over federal questions and many problems concerning the extent of original federal question jurisdiction, the retention of non-federal grounds in suits instituted under it, the scope of review in appeals from state courts, the alternative review procedures of certiorari and certificate, etc. See generally, Hart and Wechsler, Federal Courts and the Federal System 400-576, 709-890 (1953).

¹⁶⁹ It is, of course, not the only system which would do so. See generally, Wagner, op. cit. supra, note 167.

¹⁷⁰ Gaudet, Communita Economica Europa 293 (1960).

private parties reach far beyond the Community Court's original jurisdiction to hear suits at their request, and, having no concurrent jurisdiction to determine state-law issues, it has no jurisdiction to hear appeals from Member-State courts. If the unifying qualities of a system based on concurrence¹⁷¹ are to be supplied, they must be developed through the shared jurisdiction. Whether this will occur depends in large part on the answers to the questions that we shall investigate in the next two chapters: (1) What are the basic jurisdictional limitations on the Court's opportunity to interpret "Community law" under Article 177? and (2) What effect do the techniques that are being developed in the exercise of the shared judicial jurisdiction have on the efficacy of the Community Court's interpretations in shaping a uniform law for the Community system?

¹⁷¹ Lenhoff, Jurisdictional Relationships Between the Court of the European Communities and the Courts of the Member States, 12 Buff. L. Rev. 296, 300-01 (1963), suggests that there is concurrence under ECSC Treaty, Art. 42, and EEC Treaty, Art. 181, as well as, under EEC Treaty, Art. 85. This can hardly be admitted. In the case of the former articles, there is no choice of forums at the inception of litigation. If the contract stipulates Community Court competence, national jurisdiction is excluded; if it does not, only national courts have jurisdiction. Under EEC Treaty, Art. 85 any concurrence is between the Commission and national courts.

CHAPTER V: The Opportunity to Interpret Community Law

There are two fundamental limitations on the opportunity of the Community Court to deal in any way under the Article 177 jurisdiction with questions of the interpretation of Community law: (1) Not all "Community law" is within the scope of the shared jurisdiction. (2) The Court's jurisdiction is derivative; it can exercise no power until called upon by a national court.

I. The Documentary Criterion

Up to this point we have been discussing the Court's interpretive jurisdiction as a jurisdiction to interpret "Community law." This is not precisely correct. Article 177 includes within the interpretive jurisdiction only questions concerning the "Treaty," the "acts of the institutions of the Community," and the "statutes of any bodies set up by an act of the Council." The jurisdiction is a jurisdiction to interpret particular documents. This limitation does not mean that the Court of Justice cannot deal with such sources of Community law as the "customary law" of the Community or "general principles of Community law." These sources are aspects of the interpretation of the Treaty or of institutional acts. Nevertheless, the documentary limitation is significant.

A. The Possibility of Gaps in a Formal Sense

By defining the province of interpretation in terms of specific types of documents, the Treaty runs some

risk of excluding from the purview of the Court of Justice certain texts which are formally sources of Community law. By texts which are "formally" sources of Community law is meant (1) any binding text established jointly by the Member States for purposes of completing or filling out the agreements made in the principal Community Treaty or (2) any such texts brought into force on the authority, at least in part, of a Community organ.

1. Texts Established Jointly by the Member States

The Final Act of the Intergovernmental Conference on the Common Market and EURATOM established a number of texts besides the EEC (and EURATOM) Treaty, which were designed to complete and make more specific arrangements included within the scope of the principal Treaty. Whether these documents fall within the scope of "Treaty" under Article 177 seems to be governed by Article 239 of the EEC Treaty which provides that all Protocols annexed to or to be annexed to the Treaty form an integral part thereof. Thus, in Wagner v. Fohrman¹ the Court of Justice quite properly interpreted the Protocols on Privileges and Immunities of the EEC and EURATOM Treaties because the Final Act specifies that these documents are to be annexes to the Treaty. Moreover, since the other Protocols and Conventions adopted by the Conference are by their own terms "annexed" to the Treaty, they are, and

¹ X Rec. 381 (see Chapter IV, notes 160-65 and accompanying text).

presumably any additional Protocols and Conventions could be made, integral parts of the Treaty under Article 239.

However, certain additional conventions among the Member States are contemplated by Article 220 of the EEC Treaty and others may be found necessary. On the basis of draft conventions thus far prepared, it is impossible to say what jurisdiction the Court of Justice might have in relation to such additional texts. The Draft Convention on Recognition and Enforcement of Judgments² and the Convention Relating to Mutual Recognition of Companies³ are not, in their present forms, made annexes to the EEC Treaty. The Member States have by "Common Declaration" indicated that they recognize the need for some unifying control over the interpretation of these documents by the Community Court, but have postponed consideration of exactly what powers should be conferred upon it. Thus, the parties' understanding of the status of these Conventions seems to be that they are not within the Court's jurisdiction without some special provision to that effect. The Draft European Patent Convention,⁴ which involves accession of non-EEC members and its own European Patent Court, cannot be expected to confer jurisdiction on the Community Court.

² CCH Com. Mkt. Rptr. § 6003.

³ CCH Com. Mkt. Rptr. § 6081.

⁴ CCH Com. Mkt. Rptr. § 5503.

2. Institutional Norm Creation

There are also to be treaties between the Community and third-party states,⁵ which are sources of Community law.⁶ These treaties are of basically two types:

(1) Commercial agreements such as the ones that have been concluded with Israel⁷ and Iran⁸ or (2) Treaties of Association, as for example, with Greece⁹ and Turkey.¹⁰ May the Court of Justice interpret these documents on referral of a question from a national court on the basis that they constitute "acts" of a Community institution?

The Council formally "concludes" such a treaty by a "decision" which is clearly an official act having legal consequences for the Member States of the Community.¹¹ Although it does not conform to any of the specific types of acts enumerated in the EEC Treaty,¹² that act might be thought to incorporate the text of the treaty thus concluded. However this rationale may never be invoked to secure an interpretation of commercial agreements because the Council

⁵ See EEC Treaty, Arts. 111, 114, 228 & 238.

⁶ Cf., Mathijsen, *Le Droit de la Communauté Européenne du Charbon et de l'Acier; une Étude des Sources*. 157-58 (1958).

⁷ 7/95 J.O. 1518/64, 13 June 1964.

⁸ 6/152 J.O. 2554/63, 23 October 1963.

⁹ 6/26 J.O. 294/63, 18 February 1963.

¹⁰ 7/217 J.O. 3687/64, 29 December 1964.

¹¹ EEC Treaty, Art. 228.

¹² See EEC Treaty, Art. 189.

practice seems to be to implement the tariff and quota liberalization specified therein by decisions to the Member States.¹³ Thus any litigation in national courts would probably concern an interpretation of those decisions rather than the commercial agreements, although the incidental involvement of the latter, particularly where there is a question of the validity of the implementing decisions, cannot be ruled out.

Association agreements may pose different problems. The EEC Treaty does not require association of any specific type.¹⁴ However, in relation to associated European states, such agreements may be expected to contemplate partial and progressive application of the Community system looking toward full membership in the Community. Thus the Convention of Association with Greece copies, paraphrases or incorporates by reference articles of the EEC Treaty in situations where no further Community acts seem to be contemplated to implement the agreement.¹⁵ A good example of the problems which might be raised with respect to "copied" provisions concerns Article 12 of the EEC Treaty, which the

¹³ See Council Decision No. 64/360/CEE, 7/95 J.O. 1524/64, 13 June 1964, and Council Decision No. 63/573/CEE, 6/152 J.O. 2553/63, 23 October 1963.

¹⁴ See generally, Sacré, *L'Association dans le Traité de Rome*, 4 Rev. Trim. de Dr. Eur. 1 (1968).

¹⁵ Action by the Conseil d'association may, however, be required. See, e.g., Arts. 51/52 of the Greek Association Treaty, 6/26 J.O. 308/63, 18 February 1963.

Court of Justice has interpreted to be directly effective in all the Member States in the sense that it creates subjective rights which may be enforced in national courts.¹⁶ Should the same interpretation be applied to the identical provision in the Association Convention? Does the "association" partake of the "independent legal order" of the Community? A Member State customs court called upon to determine the legality of the application of customs duties to Greek goods may well want an answer to these questions.

The terms of the Greek Association Treaty cast some doubt upon the possibility of considering it, or other treaties concluded by the Council on behalf of the Community, as Community acts subject to interpretive referral. Mention is made of a jurisdiction in the Court of Justice to decide questions of the interpretation and application of the Greek Convention, but only on a referral to it by the Council of Association set up under the Treaty, which can in turn be seized of such questions only by Member States of the EEC, the Council or Commission of the EEC, or the Greek Government.¹⁷ Moreover, one might say that in general the nature of a negotiated international agreement militates against its being considered as equivalent to an "act" of a Community institution, although powerful arguments have also been

¹⁶ N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration, Case No. 26/62, IX Rec. 1, February 5, 1963.

¹⁷ Greek Association Treaty, Art. 67, 6/26 J.O. at 312/63.

marshalled the other way.¹⁸ The issue is very much in doubt.

Nor are treaties between the Community and third states the only binding norms emanating from Community organs which might fall outside the Court's jurisdiction under 177. The European Investment Bank, for example, may make certain binding determinations,¹⁹ but strictly construed it is not an "institution" of the Community. Similarly questions concerning the acts of special organs established by the Council might not be cognizable under the interpretive jurisdiction, unless they were considered as an aspect of the interpretation of the organ's statute²⁰ or as imputable to the Council.²¹

B. The Substantive Problem

1. Law National in Form

The definition of the legitimate objects of

¹⁸ See, e.g., Bebr, Judicial Control of the European Communities 54/55, 187 (1962).

¹⁹ See EEC Treaty, Arts. 129-130, 180; Protocol on the Statute of the European Investment Bank.

²⁰ The Court of Justice has, for example, been given jurisdiction under 177(3) to interpret the Statutes of the Administrative Commission created by Regulation 3, Arts. 43-44.

The Regulation does not specify this jurisdiction. It is in Article 15 of the Commission's statutes which apparently are drawn up by the Commission itself under Regulation 3, Art. 44 para. 2. Maas, The Administrative Commission for the Social Security of Migrant Workers, 4 C. M. L. Rev. 51, 61 (1966).

²¹ See Société Nouvelle des Usines de Pontlieue-Aciers du Temple (S.N.U.P.A.T.) v. High Authority, Cases Nos. 32-33/58, V Rec. 275, 17 July 1959.

the Court's interpretive interest in terms of specific texts also curbs its power to influence the development of law which is formally not of Community origin but which has been promulgated in pursuance of a binding Community policy decision - a policy decision which may be thwarted by the lack of a coherent interpretation of the measures taken in execution of it and which gives to those measures a "substantive" Community character. This situation may arise wherever Member State laws, of administrative or legislative origin, are enacted in fulfillment of obligations created for the Member States by a Community decision or directive. Considering what was said earlier about the general "jurisdiction sharing" structure of the EEC and the importance of the use of directives and decisions directed to Member States in that scheme, the inability of the Court of Justice to interpret national law could place a substantial limitation on the ability of the Court to exercise an effective influence over the development of what is in substance "Community law."

The problem is particularly striking in the area of the harmonization of Member State legislative and administrative provisions which have a direct incidence on the establishment or functioning of the Common Market.²² Harmonization is accomplished by directives, and, thus, the

²² See, generally, EEC Treaty, Arts. 100-102. Under other provisions "direct incidence" is presumed and a power to issue harmonizing directives is conferred in respect of particular subject matter. E.g., Arts. 52-56, 99.

"harmonized" Member State norms alone are binding on individuals. It is these provisions which will fall to be interpreted by national tribunals, and presumably only those tribunals will be competent to interpret this national law with a Community content. On referral of a question of interpretation concerning such provisions, the Court of Justice would be forced to say that it had no jurisdiction to interpret the acts of institutions other than those at the Community level. Query how long substantive harmonization can be expected to last without some overriding Community control of national court interpretations?

This is not to say that the Court of Justice may have no influence on the development of harmonized national norms. A national court dealing with such national rules may consider that its understanding of them requires an interpretation of the Community directive pursuant to which they were enacted and may ask the Court of Justice for an interpretation of that directive. However, national courts, even at the highest level, need not refer Community directives for interpretation as an aid in interpreting national law. Strictly speaking, the interpretation of the directive is not relevant. By definition the directive apparently cannot form the applicable "rule of the case," and, since the national law may envisage national purposes in addition to the carrying out of the Community directive, the interpretation of the directive need not be the same as the national law or vice versa. The national court may interpret

the national rule without "raising" a question of the interpretation of the Community act.

The situation may be somewhat different where a question of the validity of the national norm is involved. If it is alleged that the national act is invalid because it does not conform to the directive (or because the directive itself is invalid), the national court may be faced with a question of the interpretation (or validity) of Community law which at an appropriate level would have to be referred to the Court of Justice. The determining factor in each case is whether the ruling on interpretation (or validity) would be relevant to the national issue.

Thus, where the allegation is that the national rule is invalid because it fails to follow the Community directive, it must appear that failure to do so affects validity. If, for example, the national act has as its sole legal basis the implementation of the directive, it may become invalid under national rules where it fails to do so.²³ In other situations the directive may be, because of the general impact of Community law on the national legal order, the only possible legitimate basis for the national act concerned. This would be true where a directly effective

²³ Cf. Judgment of 3 September 1963, Finanzgericht Bremen, 12 E.F.G. 102 (1964), 3 C.M.L. Rev. 94 (1965). The Court in this instance failed to ask for an interpretation of the Council decision involved, but had it done so it would almost certainly have discovered that the effect of the decision did not fulfill the criteria upon which the delegation of authority to the German executive had been based.

provision of the Treaty prohibits action by Member States except when taken in accordance with Community directives.²⁴ The problem may be further complicated for certain national jurisdictions where the national measure of implementation is a legislative act not subject to judicial review. The temptation then is to avoid conflict by a restrictive interpretation of the national act or the Community norms involved or both.²⁵

In general, then, the influence of the Court of Justice on the interpretation of harmonized national laws cannot be expected to be significant. The question is how important the lack of unifying control in this area might be in the overall functioning of the Community, and, if it is particularly detrimental to the effectuation of Community policy, what might be done about it?

On the basis of the definition of directives in the Treaty,²⁶ one might easily come to the conclusion that uniform interpretation of the national rules created in

²⁴ This was essentially the situation in the "Rotterdam" case discussed in Chapter IV supra, although a decision was there in question. The same problem might occur, e.g., in relation to Articles 95-97 of the Treaty, or under other provisions which do not specify the use of directives but in relation to which their use is optional.

²⁵ See discussion of the French position in Prats, Incidences des dispositions du traité instituant la Communauté Economique Européenne sur le droit administratif français, 4 Rev. Trim. de Dr. Eur. 19, 39 (1968).

²⁶ Article 189 reads in part: "Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means."

implementation of them is not a significant concern. The definition seems to presume that the policy behind a particular directive may be effectuated in several ways and that the means employed only incidentally affect the ultimate realization of the policy. Since national implementation may take a variety of forms, interpretation by the Court of Justice could in any event be directed only at maintenance of the common policy, not at ensuring that national norms were given a unified meaning. Moreover, since the choice of form and means at the national level might allow the concurrent effectuation of national and Community policies in a single normative act, interpretation of that act by the Court of Justice would be inappropriate.

However, as was noted in Chapter II, the use of the Treaty forms of executive action can be so flexible as to cause the different types of acts to become substantively almost indistinguishable. Directives may set down ends to be achieved with varying degrees of specificity and with the use of different types of legal language.²⁷ In some cases the discretion left the Member States as to form and means appears to be limited to the determination of the agency which will copy the Community provision into the

²⁷ Compare, e.g., Articles 1-3 of the First Directive for the Implementation of Treaty Articles 67, 43, J.O. 921, July 12, 1960, with, e.g., Articles 4, 5, 9, 10 & 22 of the Council Directive on the Approximation of Legislative, Regulatory and Administrative Provisions Governing Branded Pharmaceuticals, 22 J.O. 369, February 9, 1965.

national rule book and on what size paper²⁸ or to the determination of the "form and means" of refraining from doing anything.²⁹ So little doubt is left in some cases concerning exactly how national law must be affected by the directives and the directives are so complete and specific that it has been suggested that they might in certain circumstances be considered self-executing.³⁰

Questions may, of course, be raised concerning the legitimacy of some of the uses to which the directive form has been put.³¹ The tendency of directives not to leave any significant discretion to national authorities was one of the practices challenged by the French Government in its January 1966 attack, in the Council of Ministers, on the functioning of the Commission. Perhaps significantly, of the ten points raised by the French, the attack on the use of directives was one of the three items dropped in the final,

28 E.g., Council Directive of 25 February 1964 (64/224/EEC), 56 J.O. 869, 4 April 1964.

29 E.g., Council Directive of 25 February 1964 (64/221/EEC), Art. 4(3), 56 J.O. 850, 852, 4 April 1964.

30 Desmedt, Les Deux Directives du Conseil de la C.E.E. Concernant la police des étrangers, 1965 Cahiers de droit européen 194, 211; Pepy, Les Questions préjudicielles dans le traité de Paris et de Rome et la jurisprudence de la Cour de Justice de la Communauté Européenne, 1966 Cahiers de droit européen 55, 69-71. See, e.g., Council Directive of 25 March 1964, 62 J.O. 981, April 17, 1964, concerning the abolition of travel and residence restrictions.

31 See, e.g., the scathing attack by Rodiere, L'harmonisation des législations européennes dans le cadre de la C.E.E., 1 Rev. Trim. de dr. europ. 336 (1965).

seven-point Council communique.³² But, if directives are to continue to be used in a manner which gives a very restrictive interpretation to "discretion as to form and means," this raises problems from the point of view of the Court. It means that there may be an effective shift in the jurisdiction-sharing relationships between Community and national norm-creating organs without a corresponding shift in the relationship between judicial organs at the Community and national levels.

(We should perhaps mention at this point that some non-judicial procedures for the assurance of national implementation of Community directives are being developed. Many directives require that the Commission be kept informed of the implementing action taken by the Member States, and certain members of the Parliament have taken it upon themselves to question the Commission pointedly and often concerning progress in this area.)

To return to the particular case of directives aimed at "harmonizing" national legislative and administrative provisions, the arguments are becoming very strong for the recognition of a role for the Court in the interpretation of the harmonized provisions. This results not only from the existence of directives, or proposed directives,

³² See the report of the various confrontations and negotiations in Bulletin CEE, March 1966, pp. 5-19.

which read like uniform laws,³³ but also from what might be called the "dual-policy" aspect of these directives. They seem to be based both on the creation of a particular, substantive Community policy in the area concerned and on the general need to eliminate "conflicts of laws" as a separate element in the creation of a truly "common" market.³⁴ The latter ground is based in part on the argument that the mere existence of non-uniform provisions and practices may retard commerce across state boundaries by small and medium-sized concerns which cannot afford the expensive legal complications that might ensue from unwelcome "surprises" in the law of a neighboring state.³⁵

It begins to appear that an assertion by the Community Court of a jurisdiction to interpret national law under Article 177 through a substantive approach to the definition of "acts of the institutions of the Community" would not be "politically inappropriate" in certain situations.

³³ See, e.g., Proposed Directive on the Coordination of the Protective Provisions of the Member States Concerning Companies, in the Interest of Shareholders and Third Parties (particularly, Arts. 3(5) & (7), 7, 8, 9(2), 12(2), (3) & (5)), 68/265 J.O. 8, CCH Com. Mkt. Reps. § 1355; Council Directive Establishing Specific Criteria of Purity for Preservatives That May be Used in Foodstuffs for Human Consumption, 22 J.O. 369, February 9, 1965.

³⁴ See Hallstein, *Angleichung des Privat-und Prozessrechts in der Europäischen Wirtschafts Gemeinschaft*, 1964 *Rabels Zeitschrift für Ausländisches und internationales Privatrecht* 211, 212-15, cited and criticized in Rodière, *supra*, note 31 at 349-50.

³⁵ See speech by M. Weinkamm, 79 Debats IX/65, Session of June 17, 1965, p. 208.

Moreover, a fairly respectable argument can be made for the juridical feasibility of such an approach.

For one thing it must be recognized that in general there is a rather thoroughgoing form/substance confusion between Community and national juridical orders. The Community Treaty and institutional determinations are at the same time a directly effective and autonomous legal system and a legal system made effective through incorporation into national law. We shall return to this problem in more detail later. For present purposes we need only note that the principal import of the leading case on the subject of the relationship of Community and national law, Costa v. E.N.E.L.,³⁶ is that Community law remains distinct from national law, and in its own sphere autonomous, although it has formally become a part of the latter through statutory ratification.

Secondly, two situations may be mentioned where the Court seems to have done something very like admitting that national action can constitute interpretable Community law. In Dingemann's v. Sociale Verzekeringsbank,³⁷ the Court gave the national court an answer, in an Article 177 proceeding, which was based on the amended classification of national legislation stated in Annex F to Article 24 of Regulation 3. However, as Advocate General Lagrange

³⁶ Case No. 6/64, X Rec. 1141, July 15, 1964.

³⁷ Case No. 24/64, X Rec. 1259, December 2, 1964.

mentions in his Conclusions,³⁸ the Community institutions have nothing to do with the amendment of Annex F beyond listing in the Annex the classifications submitted to them by member governments. The Advocate General never reveals why he brings up this peculiarity in the procedure for the adoption of the text upon which the whole case turns, but it is suspected that he may have had our present jurisdictional problem in mind. Unless one adopts a rationale whereby the Council is said continuously to adopt or re-enact national classification determinations through the notification procedure, it must be admitted that in this situation a national act, in furtherance of the Community classification system set out in the Regulation, has become a Community act for purposes of an interpretive referral. The Court can hardly be faulted for failure to deal with this obscure jurisdictional difficulty in a case where all it had to do was read the language of the Annex to solve the interpretive problem.

The second and possibly more relevant instance of what in the language of the international lawyer might be called the "reverse transformation" of national into Community acts occurred in the Toepfer case discussed in Chapter IV.³⁹ There, it will be remembered, measures of safeguard originally taken by the German Government were allowed to be contested in a proceeding for annulment

³⁸ X Rec. at 1287-88.

³⁹ Notes 62-65 and accompanying text.

against the EEC Commission, because the Commission approval "validated" them and thereby made the Community decision the act which directly affected the plaintiff. As was noted in the previous discussion, Toepfer does not enunciate principles of general application because the Court avoids all discussion of the positions of the Advocate General and of the Commission on the issue of the use of "discretion left to the Member State" as a criterion for the determination of the substantive nature of a particular act.

However, if the particularistic approach of the Court can be combined with the suggested criterion of the Advocate General, the case might be thought to point the way toward an increasing role for the Community Court in the interpretation of national provisions with a Community content. A substantive appreciation in particular instances of whether the degree of discretion left to Member State organs implementing Community policy is so small that the national acts should be interpreted as Community acts seems more in keeping with the realities of jurisdiction-sharing between Community and national organs than determinations based on the formal nature of the Community Act taken.

Yet it is extremely doubtful that any such development could take place. The approach that we have been taking to this question is one that is grounded in the "progressive logic" of the functioning of the Community. To fulfill basic aims a practice develops of reaching beyond "harmonization" to "uniformity" of law. This entails a

stretching of the function of "harmonizing" directives, and from this development the logic of extending judicial control becomes obvious. But the logic does not have to be accepted, and in this case there is an aspect which would almost certainly result in its rejection. To admit a capacity in the Court of Justice to interpret under Article 177 what is in form national law is necessarily to admit a capacity to determine the validity of that law. Juridically the step from Toepfer and Dingeman's to the sort of substantive approach we have been suggesting is not great. Politically it is enormous. It is to take a giant step toward the sort of Court of which Justice Holmes of the United States Supreme Court spoke when he said,

"I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."⁴⁰

The converse of that statement more nearly applies to the jurisdiction of the Court of Justice.

Nor should the technical difficulties of a substantive approach be overlooked. As we shall see, the problems of adjusting the jurisdictional relationships between the Community and national courts are difficult enough when the determination of the existence of preliminary questions of interpretation is related to a formal listing of documents. The introduction of an additional variable in

⁴⁰ Holmes, Law and the Court in Collected Legal Papers 295-96 (1920).

this process, particularly one involving in each instance an evaluation of overall Community policy and jurisdictional relationships, can hardly be viewed as conducive to promoting an efficient collaboration between Community and national courts under Article 177.

If any major breakthrough in this area is to be achieved, it will have to originate in the political institutions, and here the proposed Treaty Instituting a Benelux Court of Justice⁴¹ offers a constructive model. A large part of the norm-creating activity in the Benelux Union takes place through the enactment of harmonized or unified national laws. Hence, the main role of the proposed Benelux Court will be to ensure the maintenance of uniformity through the exercises of a preliminary jurisdiction very similar to the Article 177 procedure. However, the scope of this jurisdiction remains under the control of the Council of Ministers, which decides which provisions are to be considered "Benelux law" for purposes of the interpretive jurisdiction.⁴²

If agreement could be reached in discrete instances concerning the importance and desirability of uniformity, the Benelux approach might be used in the EEC without modifying the Treaty. Individual directives might contain a clause requiring (1) the provision in national law of interpretive jurisdiction in the Court of Justice in relation

⁴¹ 1964-2 Bulletin Benelux 5-32.

⁴² Id. at Article 1, p. 24.

to the substantive norms enacted pursuant to the directive and (2) the creation of a capability and a duty of referral by national courts under the same conditions as stipulated in Article 177, but omitting questions of validity. Since, unlike the ECSC Treaty,⁴³ the EEC Treaty does not specifically empower the Community Court to exercise jurisdiction conferred by national law, there would be a question of the Court's ability to function under jurisdictional grants of this type. However, in the interest of ensuring the "observance of law in the interpretation and application"⁴⁴ of the Treaty, there seems no adequate reason why the Court should feel constrained to reject such conferrals of jurisdiction.

A question might, of course, also be raised about the ability of the Council to "direct" national governments to provide jurisdiction for the Community Court. However, such a power might be implied from the power to issue harmonizing directives and certainly could be based on Article 235. Under the latter article it might be possible for the Council merely to stipulate jurisdiction in the Court of Justice by a regulatory provision,⁴⁵ thus avoiding complications which might ensue at the national level should

⁴³ ECSC Treaty, Art. 43.

⁴⁴ EEC Treaty, Art. 164.

⁴⁵ Note that this would not presume a general power in the Council to regulate the Court's jurisdiction. Article 235 provides a basis only for granting additional powers.

the substantive and jurisdictional elements of an harmonizing directive have to be implemented by different national agencies.⁴⁶

2. Law National in Content

The reverse problem may be briefly mentioned. Community law or rather Community "texts" may occasionally refer to national law directly or by implication as the controlling norm in particular cases.⁴⁷ Since the Community Court has said many times that it cannot interpret national law, such referrals to national law may be thought to deny any effective interpretive jurisdiction to the Community Court under Article 177. However, so long as the Treaty or an act of a Community institution is involved the Court may at least determine the extent to which such provisions have an applicable community content and the extent to which only national law questions are involved.

⁴⁶ Implementation procedures vary from state to state, but in some cases at least administrative agencies are charged with this responsibility and they would probably not also have the authority to regulate judicial jurisdiction. See generally, Solmon, L'Application en France des Directives de la C.E.E., 1965 Rev. du Marché Commun 165.

⁴⁷ See, e.g., EEC Treaty, Art. 192 and, indeed, the third paragraph of Article 177.

We are not concerned here with situations in which national law is used as a source for the development of Community concepts, for example, Article 215's direction to develop principles of non-contractual liability based on principles common to the laws of the Member States or the use of comparative data in the interpretation of terms such as détournement de pouvoir.

Thus, for example, in L.T.M. v. M.B.U.⁴⁸ the Court was called upon to interpret Article 85(2) of the Treaty which provides, "any agreements or decisions prohibited pursuant to this Article shall automatically be null and void." More specifically the question was whether only the provisions of an agreement which violated Article 85(1) or rather the entire agreement was null under section (2). The Court had basically three options: It could have decided that the nullity involved was wholly a question of Community law, that it depended entirely on national civil law rules or that both Community and national law should be used to determine the validity of the agreement involved. The Court took this latter approach by interpreting the Treaty to require the nullity of those provisions of any agreement which fell directly under the interdiction of 85(1) or were inseparable from such provisions, but as leaving the nullity of other elements of the agreement to national law.

Of course, the Community Court may develop the content of national law as a necessary part of deciding cases under grants of jurisdiction other than Article 177,⁴⁹ and it uses interpretations of national law furnished by national courts as a part of the factual context underlying

⁴⁸ Case No. 56/65, XII-4 Rec. 337, 30 June 1966.

⁴⁹ Gouvernement du Royaume de Belgique v. Société Commerciale Antoine Vloeberghs and the High Authority, Third Party Opposition, Cases Nos. 9 & 12/60, VIII Rec. 330, 12 July 1962.

interpretations given on the basis of national court referrals.⁵⁰ Indeed, in order to interpret its own jurisdiction the Court of Justice has been forced to examine national procedural rules in order to determine whether a particular Dutch arbitral tribunal was a "court" within the meaning of Article 177.⁵¹ But this was not to say that the tribunal should be considered a court under national legal categories.

II. National Court Initiative

The influence of national court initiative on the overall position of the Court of Justice as "unifier" and "maintainer" of Community law is not difficult to appreciate - the Court cannot interpret Community law that it does not encounter. The problems in this area are reasonably well known, and we shall not go into them very deeply from the national court point of view.⁵² This study is, after all, concerned with the jurisprudence of the Court of Justice. While national court practice must be reviewed to some extent in order to establish what sort of problems are developing, our primary interest is in what the Court of Justice

⁵⁰ See, e.g., *Adrianus Dekker v. Bundesversicherungsanstalt für Angestellte*, Case No. 33/65, XI-10 Rec. 1111, 1 December 1965.

⁵¹ *Veuve G. Vaassen-Göbbels v. Direction du Beambtenfonds voor Het Mijnbedrijf*, Case No. 61/65, XII-4 Rec. 377, 394, 30 June 1966.

⁵² See, e.g., *Dumon, Le Role des Juridictions Nationales: Le Renvoi Préjudiciel*, in *Les Semaines des Bruges, Droit Communautaire et Droit Nationale* 197 (1965) for an extensive discussion of the problems of national jurisdictions with the referral jurisdiction.

has done and might do should national court initiative within the shared jurisdiction tend to prevent it from performing its proper role in the Community legal system.

A. Courts from Which Appeal Lies under National Law

There are, of course, limits to the discretion exercised by national courts to refer or not to refer questions of Community law to the Community Court. If the national court is one from which no appeal lies under national law, it must under the terms of Article 177, paragraph 3, refer questions of Community law raised in litigation before it to the Community Court. One of the common questions raised in doctrinal treatment of Article 177 has been to ask which national courts are affected by this provision. What is meant by no appeal under national law? No appeal at all? No appeal of right? No appeal save by extraordinary remedies? No appeal in the particular case at bar?

The Court of Justice could lay down some criteria on this point were the question asked by a national court, for Article 177 is also within the Court's interpretive jurisdiction. It might do so by dictum in an appropriate case, and it has made at least one statement which could be viewed as expressing an attitude on this question.⁵³ On this point one need only say that it is suspected that the problem will eventually be solved, if at all, by a more detailed

⁵³ Costa v. E.N.E.L., Case No. 6/64, X Rec. 1141, 1158, 1182, 15 July 1964. The statements made were in no way critical to a decision in the case.

spelling out of the national jurisdictions affected, as is done in the proposed treaty for a Benelux Court of Justice,⁵⁴ and that the basic policy should be a distinction between courts exercising a supervisory, unifying and "law-creating" role in national juridical orders and those exercising trial and intermediate appellate jurisdictions. As presently framed ("une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne") Article 177(3) applies or seems to apply to a considerable range of small claims courts and the like whose judgments are not appealable. This may involve different types of courts in different Member States depending upon national jurisdictional rules, and the problem of working out a solution which will put the Court of Justice in the same relationship with national jurisdictions exercising comparable powers in each Member State is, technically, a difficult one. It will require thoroughgoing comparisons of national procedures at all levels, and it is certainly a task better suited to a special commission of inquiry than to a court rendering a judgment in a particular case.

There seems no great rush on the part of the Court of Justice to produce firm rules on this point. It is clear that certain courts, e.g., national supreme courts, courts

⁵⁴ See, Exposé des Motifs, Traité relatif à l'institution et aux statuts d'une Cour de Justice Benelux, p. 14, in 1964-2 Bulletin Benelux. Query to what extent this treaty may be used to interpret Article 177 and vice versa? See, Schultsz, Rapport néerlandais in 13 Sociale-Economische Wetgeving 487, 491-92 (1965).

of cassation, courts of final administrative jurisdiction, will come within the mandatory referral provisions, and there is the possibility that national jurisdictions might interpret the scope of 177, paragraph 3, more liberally than is strictly necessary,⁵⁵ thus increasing the effective power of the Court of Justice. At any rate it is obvious from a reading of Article 177 that national trial courts will in general have no duty to refer questions of the interpretation of Community law to the Community Court, although they may do so. A few examples of the widely varying treatment that the Community treaties and executive acts may receive at the hands of these courts will illustrate the necessity of some unifying control over the latter's application of Community law, law which has as its underlying rationale the equalization of conditions of trade and competition within the Community.

The largest number of cases involving Community law which have been decided by national courts concern the Community competition rules, and the confusion among national courts in this area has been significant. Part of the problem is procedural; it concerns the respective competences of the Commission, national cartel authorities and national

⁵⁵ See, e.g., *Grundig Radio-Werke GmbH v. Technische Handelssonderneming Nibejá N.V.*, Hoge Raad, 12 January 1962, [1962] C.M.L.R. 205.

courts⁵⁶ to deal with alleged violations of the Community rules and the effect of notification of agreements to the Commission. Some courts conclude that the notification of an agreement to the EEC Commission ousts their jurisdiction to determine that the agreement in question is void,⁵⁷ while others have decided that they retain jurisdiction so long as the Commission has not acted.⁵⁸ There have also been decisions which recognized the competence of the national court to enforce the contract in question or to declare it void, but which refused to do so because of the possibility

⁵⁶ There is some question about whether national courts are competent to apply the Community competition rules at all. In *Société Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch, GmbH*, Case No. 13/61, VIII Rec. 89, 103, 6 April 1962, the Court of Justice indicated that only national cartel authorities were so competent and this would extend to Art. 9 of Reg. 17 which refers back to Article 88 of the Treaty. However, since the Court also said that Art. 85 was in principle applicable in national legal orders from the inception of the Treaty, it and the Regulations would presumably have to be applied by national courts where relevant to suits before them.

⁵⁷ *Société Union Nationale des Economies Familiales v. Etablissements Consten*, Ct. of App. Paris (1^{re} Ch.), January 26, 1963, (1963) Dalloz. Jur. 189, [1963] C.M.L.R. 176; *N.V. Technische Handelsonderneming Nibaja v. N.V. Graetz Nederland*, Gerechtshof Amsterdam, June 28, 1962, [1963] Nederlandse Jurisprudentie 521, [1964] C.M.L.R. 366.

One court seems to have decided that the promulgation of the Community regulations on competition has ousted all national court jurisdiction. *Blume v. Van Praag*, Commerce Court, Antwerp, October 25, 1962, 78 Journal des Tribunaux 733 (1963), [1964] C.M.L.R. 17.

⁵⁸ *Société Arlab Import-Export v. Etablissements Consten*, Commerce Ct. of the Seine, June 25, 1962, [1963] C.M.L.R. 185.

of a contrary ruling by the Commission.⁵⁹ In one case the national court seems to have confused the 177 procedure with the procedure for referring agreements to the Commission. The result was the doubly incorrect ruling (1) that the national court could not refer the question of interpretation to the Community Court and (2) that it could decide that the contract was valid under EEC Treaty, Article 85(3).⁶⁰

Substantive questions have also been dealt with, such as, the effect of the competition rules on general terms of sale⁶¹ or on patent and trademark rights,⁶² or the

⁵⁹ Judgment of 4 May 1962, Kammergericht (Kartellsenat) Berlin, 12 Wirtschaft und Wettbewerb (hereinafter "WuW") 697 (1962), [1963] C.M.L.R. 336; S.A. Association General des Fabricants Belges de Cement Portland Artificiel v. S.Z. Carriere Dufour, Cour d'Appel Bruxelles, 25 June 1964, [1965] C.M.L.R. 193.

⁶⁰ Compagnie Francais Telefunken, S.A. v. Etablissements Aubin, Tribunal de Commerce, Marseille, 13 May 1964, [1965] C.M.L.R. 185.

⁶¹ A.S.P.A. v. Superbazars, Commerce Ct. of Brussels, 23 March 1962, 77 Journal des Tribunaux 298 (1962), [1963] C.M.L.R. 28; Bara v. Advance Transformer Co., Commerce Ct. of Brussels 2 December 1963, 79 Journal des Tribunaux 229 (1964), [1964] C.M.L.R. 379 (exclusive sale agreements).

⁶² Biochemie GmbH v. Nogeapha N.V., Rechtbank, Amsterdam, 5 May 1964, [1965] Nederlandse Jurisprudentie 270, [1965] C.M.L.R. 248; Constructa Werke GmbH v. De Geus en Uitdenbogerd N.V., Hoge Raad, 10 April 1964, [1964] Nederlandse Jurisprudentie 1121, [1965] C.M.L.R. 17; Henkel & Cie v. Sommer, Oberlandesgericht, Hamm, 20 December 1963, 14 W.u.W. 535 (1964), [1964] C.M.L.R. 509.

meaning of "affecting trade between the Member States"⁶³ under Articles 85 and 86 and of "involving imports or exports"⁶⁴ under Regulation 17. All of these are extremely complex and important problems, and the failure of national courts to refer questions to the Community Court, coupled with what has seemed a very slow process of dealing with appeals and notifications by the Commission, has allowed the application of the competition rules by national courts for several years with no clear Community guidance.

In some cases there seems to be no recognition by national courts of the problems involved. In N.V. Union de Remorquage et de Sauvetage v. N.V. Schelde Sleep vaart-bedrijf,⁶⁵ for example, a group of tug boat operators were found by the national tribunal to have abused their dominant position within the meaning of Article 86. However, there was no mention that Regulation No. 141 had made the general competition regulation, Regulation 17, inapplicable

⁶³ E.g., Judgment of 14 January 1963, Landgericht Munich (Commercial Chamber), [1963] C.M.L.R. 268; Spierkel v. Agence et Messageries de la Presse S.A., Cour d'Appel, Bruxelles, 1 June 1962, 77 Journal des Tribunaux 459, [1964] C.M.L.R. 142; Lagattolda v. Societa F.E.R.G.A.T., Turin Ct. of App., 6 June 1963, 86(I) Foro Italiano 2049 (1963), [1964] C.M.L.R. 84; Judgment of 22 January 1965, Landgericht Mannheim, 1965(2) Aussenwirtschaftsdienst (hereinafter "A.W.D.") 60, [1965] C.M.L.R. 231.

⁶⁴ F.I.V.A. v. Mertens, Kantangerecht, Amsterdam, 9 May 1963, [1963] C.M.L.R. 329.

⁶⁵ Commercial Ct., Antwerp, 6 July 1964, 28 Rechtskundig Weekblad 314 (1964), [1965] C.M.L.R. 251.

to the transport sector nor was there any discussion of how the operations involved, which were apparently carried on wholly within Belgium, affected trade between Member States. The decision may have been correct, but, if so, it would seem more by luck than by design.

Of course, problems also exist outside the area of competition. The best examples of confusion are those in which diametrically opposed conclusions are reached concerning the same provisions, and somehow German courts seem particularly adept at producing conflicting decisions. Thus, the Finanzgericht of the Saar has ruled that the intra-Community levy may be applied to agricultural products under certain circumstances where the substantive but not the formal requirements for such treatment have been met,⁶⁶ while the Hamburg Finanzgericht has applied strict formal criteria - no form D.D.4, no preferential treatment.⁶⁷ Similarly, it appeared for a while that the German import adjustment tax was somehow not equivalent to a customs duty when applied to potato flour⁶⁸ and hence not prohibited by Council Regulation No. 19, but that the same tax was so prohibited when applied

⁶⁶ Judgment of 30 January 1964, 12 *Entscheidungen der Finanzgerichte* (hereinafter "E.F.G.") 512 (1964), [1965] C.M.L.R. 77.

⁶⁷ Judgment of 19 November 1964, 13 E.F.G. 327 (1965), [1965] C.M.L.R. 268.

⁶⁸ Judgment of 9 October 1963, *Finanzgericht Nuremberg* (2d Cha.), 11 E.F.G. 326 (1963), [1964] C.M.L.R. 96.

to tapioca meal.⁶⁹ The conflict was made symmetrical by the reaffirmance of its position by the "potato-flour" court in a case involving tapioca,⁷⁰ but should now have been cleared up by a series of referrals from German finance courts.⁷¹

Why do these courts not make referrals to the Court of Justice? The sinister motive of a simple desire to obstruct the application of Community law should probably be ruled out. If this is the problem, there is not much that can be done about it, and like a physician, the Court of Justice would do better to administer treatment for a curable disease in the hope that the diagnosis of an incurable one is incorrect. Moreover, a diagnosis of interposition of national prerogative does not seem to be supported by the facts. There are probably as many cases which give too far-reaching an effect to Community rules,⁷² as there are those

⁶⁹ Judgment of 9 April 1963, Finanzgericht Bremen, 11 E.F.G. 376 (1963), [1964] C.M.L.R. 304.

⁷⁰ Judgment of 23 March 1964, Finanzgericht Nuremberg, 12 E.F.G. 282 (1964), [1964] C.M.L.R. 310.

⁷¹ See particularly, *Firma August Stier v. Hauptzollamt Hamburg-Ericus*, Case No. 31/67, XIV-3 Rec. 347 (4 April 1968).

⁷² See, e.g., Decision of 17 March 1964, Finanzgericht Dusseldorf, 702 E.F.G. 572 (1964), [1965] C.M.L.R. 97; *Noni v. Caisse d'Assurance, Paris Ct. of App.*, 4 March 1964, [1964] Dalloz. Jur. 419, [1964] C.M.L.R. 334.

See also Judgment of 23 April 1963, Finanzgericht Nuremberg, [1964] C.M.L.R. 178, which takes a very "Community oriented" view of Commission powers in relation to national powers under Regulation 22, Art. 6(3) & (4) in an ambiguous situation.

in which the full force of Community law is avoided in favor of national norms.

It has been suggested many times that the principal difficulty is educational; the 177 procedure is new and courts and parties tend not to know or to forget that it exists. This is no doubt true. Many of the cases we have just been discussing make no mention of the possibility of a referral to the Court of Justice. Counsel are yet unaccustomed to framing their arguments in a way which brings out the questions of Community law involved or which lay the foundation for a request for a referral.⁷³

Confusion about the proper use of Article 177 also plays a part where a question of Community law requiring interpretation is recognized by the national court. In Torrekens v. Caisse Regionale de Sécurité Sociale an attempted referral came to nought because the Court of Appeal of Douai⁷⁴ referred its question, not to the Court of Justice, but to an administrative commission set up under the Community regulations on social security. There are also

⁷³ Compare Judgment of 3 September 1963, Finanzgericht Bremen, 12 E.F.G. 102 (1964), 3 C.M.L. Rev. 94 (1965), Note, 3 C.M.L. Rev. 95 (1965), wherein the Community issues are submerged in arguments on national-law questions, with the excellent use of alternative argumentation in the Judgment of 12 December 1963, Finanzgericht Hamburg, 40 Zolle und Verbrauchsteuern 151 (1964), [1965] C.M.L.R. 270, which brings out all the Community law questions involved and how they are related to the national law problems.

⁷⁴ 8 October 1963, [1964] Dalloz. Jur. 299, [1965] C.M.L.R. 26.

tales of French decisions being shuttled from desk to desk at the Quai d'Orsay and of a Luxembourg decision which stayed the national proceedings but which was not made known to the Court of Justice until some months later, when a clerk at the latter telephoned to check a rumour that such a decision existed.

Moreover, the ability of national courts to interpret the Treaty means that they may also interpret Article 177. Thus, they may find that they are not a "court"⁷⁵ (jurisdiction) within the meaning of 177, that the type of proceeding before them rules out the possibility of an interpretive referral,⁷⁶ that the question that they might ask would involve an "application" rather than an "interpretation" of the Treaty and hence would not come within the jurisdiction of the Court of Justice⁷⁷ or that the Court of Justice may not decide "conflicts of laws" questions.⁷⁸ These types of decisions prevent the Court of Justice from functioning as unifier and maintainer of Community law in the

⁷⁵ Judgment of 22 July 1964, Dutch Arbitral Tribunal, [1964] Arbitrale Rechtspraak 240, 1964 Revue de l'Arbitrage 28.

⁷⁶ Judgment of 30 May 1963, Oberlandesgericht Munich, 13 W.u.W 626 (1963), [1964] C.M.L.R. 87. Contra, Grundig Radio-Werke GmbH v. Technische Handelsgesellschaft Nibela N.V., Hoge Raad, 12 January 1962, [1962] C.M.L.R. 205.

⁷⁷ Henckels & Hammes far Holland N.V. v. Henckels Zwillingswerk Nederland N.V., Ct. of App. Arnheim, 5 December 1962, [1963] C.M.L.R. 322.

⁷⁸ État Français v. Nicolas, Cour d'Appel, Amiens, 9 May 1963, [1963] Dalloz. Jur. 556, [1963] C.M.L.R. 239.

very cases which seem to admit that its guidance is needed. Can anything be done about them or about the disparate treatment of Community law at the hands of lower national courts?

Of course, nothing can be done to compel national courts, which have no obligation to do so, to refer questions to the Court of Justice. On the other hand strenuous, "unofficial" efforts by members of the Court of Justice and others have been and are being made to educate national judges and lawyers in the problems and techniques of cooperation between the Community Court and national courts within Article 177.⁷⁹ The present direction of these efforts seems to be toward getting national courts (1) to recognize questions of interpretation and (2) to refer these questions to the Community Court.

This is certainly a worthwhile approach over the short-term, but the second part of it will probably have to be revised in the not too distant future. A really conscientious effort by national courts to refer all questions of Community law would, as the incidence of litigation involving Community norms increases, become onerous both for the Community Court and for national litigants subject to repeated delays.

⁷⁹ See, e.g., Dumon, La Cour de Justice des Communautés Européennes et les Juridictions des États Membres, 14 Rev. Int'l de Dr. Comparé 369 (1962).

Moreover, it is reasonably certain that national judges will not be persuaded to make a habit of referrals at the trial court level. National courts recognizing that they are faced with questions appropriate for referral to the Court of Justice have in several cases exercised their discretion not to make a referral on grounds that to do so would not be conducive to an efficient administration of justice.⁸⁰ There may, for example, be competing views of the applicable national law. Choices made at the appellate level could then be determinative of the relevance of the question of interpretation of Community law. Moreover, there is no guarantee that the point of Community law will be maintained on appeal, and, if it is, the case should eventually reach a national court which is required to make a referral to the Community Court. Of course, it is also possible that an interpretation by the Court of Justice on referral at the appellate level would raise new issues of fact which would require an remand back to the trial court and thus result in a delay rather than an expedition of the final resolution. The weighing of these possibilities is within the discretion of the trial judge.

But, how then is some uniformity of understanding of Community law to be achieved at the trial court level? It is suggested that this can only be accomplished by the

⁸⁰ Judgment of 9 October 1963, Finanzgericht Nuremberg, 11 E.F.G. 326 (1963), [1964] C.M.L.R. 96.

development of procedures which will ensure extensive opportunities for the rendition of authoritative interpretations by the Community Court on referral from national reviewing courts which have a duty to refer questions. These interpretations will impinge on lower national jurisdictions in two ways. First, they have influence simply as judgments of the Court of Justice. Such interpretations are not generally considered "binding" on courts other than the one to whom they are addressed in the sense that a hierarchically superior court's decisions are binding on lower courts in a national system. However, national courts are bound to apply Community norms of which the Community Court is the authentic interpreter, and there is little doubt that national courts do tend to follow existing interpretations.⁸¹ Second, the interpretations by the Court of Justice become incorporated in the decisions of national courts which, because of their supervisory power within the national judicial system, exert a unifying influence on national law.

B. Courts from Which No Appeal Lies Under National Law

We turn then from courts which have absolute discretion concerning whether to refer interpretive questions to the Court of Justice to those which apparently have an absolute duty to do so. But, like most legal "absolutes," there are techniques by which this duty may be made relative.

⁸¹ See note 102, infra.

1. The Question of "Questions"

a. The Problem

One of the principal problems in relation to courts which supposedly have no "discretion" about referring questions under Article 177 is to get them to realize that they have a "question" of Community law at all. A good example of this is the celebrated Re Société des Petroles Shell-Berre⁸² decided by the French Conseil d'Etat. In that case the plaintiff requested that several questions, including the effect of Article 37 of the EEC Treaty on the position of French laws and regulations governing petroleum importation, be submitted to the Community Court. No referral was made because the Conseil decided, in accordance with the well-known French doctrine of l'acte claire, that no "question" of the interpretation of Community law was involved.

The submissions of the Commissaire du Gouvernement in this case are illuminating. She suggests that a practical solution to the problem of when an interpretive question exists may be found in the form of proceedings before a national court. The national judge is always concerned with particular facts. If, when he views these facts in relation to the allegedly applicable text, a solution appears, he can no longer formulate an abstract question for the Community

⁸² 19 June 1964, [1964] R.D.P. 1019, [1964] C.M.L.R. 462. The Shell-Berre case continues to exercise a strong influence in the Conseil. See, e.g., Syndicat national des importateurs français en produit laitiers et avicoles, 27 January 1967, [1967] R.D.P. 781.

Court. Thus, a possible difficulty is dismissed because in the context of the facts of the case the text is clear.

The Shell-Berre theory is, of course, open to criticism for its presumptions: (1) that the Court of Justice deals only with completely abstract questions,⁸³ and, more importantly for present purposes, (2) that the interpretation which "appears" to the national judge in a specific instance is a correct one in the context of the general purposes of Community law.⁸⁴ It may also be questioned whether the text was clear with respect to the particular issues in the Shell-Berre litigation.⁸⁵ One month prior to the Conseil d'Etat's decision, an Italian court, faced with almost exactly the same issues concerning the relationship between Community law and the French law and regulations attacked in Shell-Berre, had referred the Albatros v. SoPeCo case to the Court of Justice for a preliminary ruling.

The use of the acte claire approach is, of course, evidence of the resilience of national modes of thought or juridical techniques where national courts are dealing with Community problems. A great deal has been said, for example, about the indebtedness of the jurisdiction of

⁸³ See Chapter VI, infra.

⁸⁴ See, e.g., Chevallier, Note, 3 Com. Mkt. L. Rev. 100 (1965); Gaudet, Exposé devant la Commission Juridique, [1965] Rev. Trimestrielle de Droit Européen 198, 205 (1965).

⁸⁵ See, e.g., Colliard, L'obscur clarté de l'article 37 du Traité de la Communauté économique européenne, [1964] Dalloz. Chron. xxxvii, p. 263; Laubadere, Note, 1964 Actualité Juridique 440-44.

the Community Court to the French contentieux administratif.⁸⁶ This is no doubt true, but the correlation must be applied discreetly where Article 177 is concerned. That article builds in part on Article 41 of the ECSC Treaty, which in turn may be related directly to the renvoi préjudiciel en appréciation de validité of the French administrative law. However, a similar institution in different contexts may have different purposes, and this becomes evident if the comparison is sought to be extended to the renvoi préjudicielle d'interprétation.⁸⁷ Although this procedure has an historical attachment to questions of the division of political power, as does the whole of the divided jurisdictional system in France,⁸⁸ its present purposes are limited to the retention of administrative court jurisdiction over questions requiring peculiar techniques of interpretation. Thus, in relation to general acts (reglements) of the administration, French judicial jurisdictions retain their interpretive competence because the same techniques may be applied to them as to any norms which might be relevant to cases before the ordinary courts.⁸⁹ In the Community system, on the

⁸⁶ See, e.g., Cartou, *Le Marché Commun et le Droit Public* 55 (1959).

⁸⁷ A concise exposition of the French practice in relation to renvois préjudicielles may be found in Heurté, Le Recours sur Renvoi des Tribunaux Judiciaires, 1958 *Actualité Juridique* 111-120.

⁸⁸ See, generally, Waline, *Traité élémentaire de droit administratif* 42-49 (6th ed. 1952).

⁸⁹ Auby et Drago, *I Traité de Contentieux Administratif* 576-77 (1962).

other hand, it is precisely these general texts, including the Treaty, which should be interpreted by the Community Court in order to maintain uniformity of law.

If the relationship between the Community and national courts is to be viewed as a relationship between general and specialist jurisdictions,⁹⁰ it must be so viewed in a peculiarly Community context, wherein the whole of Community law requires "specialist" treatment.⁹¹ Although the Community Court clearly does not have a position equivalent to the Bundesverfassungsgericht, the underlying rationale of the interpretive renvoi under Article 177 may have a closer affinity to the referral procedures applicable in German constitutional practice, which are designed to ensure unified interpretation of the basic norms and which have strong overtones of federal control,⁹² than to French administrative practice.

Yet, however erroneous its application may have been in the particular situation of the Shell-Berre

⁹⁰ Chevallier, op. cit. supra, note 1, at 183-86.

⁹¹ Gaudet, Exposé devant la Commission Juridique, [1965] Rev. Trimestrielle de Droit Européen 198, 199, stresses that the "education" of national judges must be not only in the techniques of Community law but also in the political importance and consequences of any decision they might make concerning Community problems.

⁹² See, Basic Law of the Federal Republic of Germany, Art. 100.

There is a rather similar constitutional question procedure in Italy under Article 23 of Law No. 87 of 11 March 1953, but it is restricted to cases where the referring court has a serious doubt about a question of constitutional validity. See, Acciaierie Ferriere di Roma S.p.A. v. High Authority, Pretore, Rome (Civil Cases), [1965] C.M.L.R. 135, 30 June 1964.

litigation, the acte claire approach is in some sense justified by the approach that the Court of Justice has taken to the meaning of "question" under Article 177. In Da Costa en Schaake v. Netherlands Fiscal Administration, for example, a Dutch court referred a question which was virtually identical to one which had previously been answered in N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration.⁹³ The court held that it was properly seized of the question and had to answer it, but noted that a prior interpretation on the same point might deprive the national court's obligation of its object and thus empty it of its purpose.⁹⁴

The Commission sought clarification of this position in the next case that was referred under Article 177⁹⁵ by seizing upon a tangential point involving Article 12 of the EEC Treaty and asking whether an interpretation of that article was necessary. It was Article 12 that had been interpreted in van Gend & Loos and in Da Costa. The Court agreed that the Dutch court's approach in the present case presumed a particular interpretation of Article 12, but denied that the national court was interpreting it; the

⁹³ Case No. 26/62, IX Rec. 1, 5 February 1963.

⁹⁴ Case No. 28/62, IX Rec. 59, 75, 27 March 1963.

⁹⁵ N.V. Internationale Crediet-en Handelsvereniging "Rotterdam" v. Minister of Agriculture & Fisheries, Cases Nos. 73/63, 74/63, X Rec. 1, 18 February 1964.

latter had merely applied the interpretation given by the Court of Justice in the two previous cases.

The Court has persisted in this position, and it is, from the point of view of an efficient administration of Community law, an understandable one. However, is it not a position which leads almost inexorably to the Shell-Berre usage of the theory of l'acte claire, a theory which was, in fact, broached by M. Lagrange in his Conclusions in Da Costa?⁹⁶ Surely, it is reasonable to suppose that texts may be clear, not only because they have been interpreted, but also because, as the French Commissaire argued, they are simply clear. The acte claire and Da Costa approaches are, of course, not identical, but they have similar tendencies to emphasize the exercise of discretion by national courts on the question of whether there is a "question" which must be referred. Moreover, Da Costa may give a false impression of the res judicata effect of Article 177 interpretations⁹⁷

⁹⁶ IX Rec. at 88-89.

⁹⁷ See, e.g., Grundig Nederland N.V. v. Ammulaan, Ct. of App. of the Hague, [1964] Nederlandse Jurisprudentie 405, [1964] C.M.L.R. 373, 20 February 1963, and Judgment of June 14, 1963, Bundesgerichtshof, 40 Entscheidungen des Bundesgerichtshofs 135 (1964), [1964] C.M.L.R. 59, both of which hold that rulings in 177 cases are generally binding on all national courts. However, the weight of opinion among commentators is that the binding effect of an interpretation is limited to the court referring the question. Compare M. Lagrange's Conclusions in Da Costa, IX Rec. at 81-83, with Chevallier, Commentaire de l'article 177 du Traité CEE a l'usage des juges et des justiciables français 183-86, Thèse, Paris, 1964 (polycopié).

and, also, prevent new referrals of old questions which could, because of subsequent developments or a changed context, require a slightly different interpretive approach.⁹⁸

The problem is to adjust the relationship of Community and national courts in order to provide an efficient administration of justice and, at the same time, cut down the possibility of divergent interpretation of Community law in different parts of the Community. It is suggested that this might be accomplished by a reinterpretation of the concept of "question" under Article 177, combined with a streamlining of the procedure for dealing with interpretive referrals by the Community Court.

b. An American Analogy

This solution is suggested by two developments in the American federal court system which, although they took place in a different political context and solved different problems, might be adapted to the situation of the Community Court. The first development is concerned with the extent of original federal court jurisdiction in cases

⁹⁸ A number of national court cases have relied upon the ruling in Société Kledingverkoopbedrijf de Geus en Uitdenboger v. Robert Bosch, GmbH, Case No. 13/61, VIII Rec. 89, April 6, 1962, and sometimes apparently without recognizing the possibility of a change in circumstances with respect to "old agreements" after the expiration of the notification period under Article 5 of Regulation 17. See, e.g., Syndicat National des Importateurs Français en Produits Laitiers et Avicoles, Conseil d'Etat [France], [1967] Recueil du Conseil d'Etat 41, 7 C.M.L. Rep. 81 (1967); Kadee v. Grundig (Nederland) N.V., Hague Court of Appeal, [1964] Nederlandse Jurisprudentie 1230, [1965] C.M.L.R. 40, 14 November 1963.

"arising under" the Constitution, laws or treaties of the United States - viz. the "federal question" jurisdiction. This jurisdiction was described earlier as being concerned with any case wherein there was a claim of right based on federal law. That is a reasonably accurate description of the contemporary understanding of the extent of the federal question jurisdiction; however, not all commentators would agree with this description, and there is jurisprudence which casts some doubts upon it. The alternative view is that, not only must a claim based on federal law be involved in the litigation, there must also be a "present controversy" concerning the operation and effect of the Constitution or laws upon the facts involved.⁹⁹

In terms of the division of powers over federal law between federal and state courts in the United States, this dispute over the nature of federal questions is really concerned with which set of courts should be the triers of fact in litigation involving federal law. For our purposes the dispute is interesting because it indicates a dual approach to the idea of "question." According to the view which is presently ascendant, "question," or really

⁹⁹ Compare Bergman, Reappraisal of Federal Question Jurisdiction 46 Mich. L. Rev. 17 (1947); Chadbourn & Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942); Forrester, The Nature of a "Federal Question", 16 Tul. L. Rev. 362 (1942), Federal Question Jurisdiction and Section 5, 18 Tul. L. Rev. 263 (1943); London, "Federal Question" Jurisdiction - A Snare and a Delusion, 57 Mich. L. Rev. 835 (1959); Mishkin, The Federal Question in the Federal Courts, 53 Colum. L. Rev. 157 (1953).

"controversy" in the American terminology, should be viewed formally. A finding of jurisdiction should require no more than that the suit involves a potential conflict concerning the meaning and effect of some federal provision, although only the application of its well-understood meaning to the particular circumstance may actually be required. Transplanted to the Community context this would mean that "question" in Article 177 could be understood, not in the sense of present "difficulty" or "doubt" or "ambiguity," but simply as involving a potential interpretation of Community law.

Clearly, this is a possible approach, but is it not going to play havoc with the administration of justice if a referral must be made every time some party decides to include a Treaty article in his pleadings? Will not many referrals be useless because the Community Court has previously set out the "meaning" of the provisions involved and because, unlike American federal courts, it has no jurisdiction to apply that meaning? This is not really so serious a problem as it might seem. For one thing this whole procedure would apply only to those courts which are bound to refer questions of interpretation to the Community Court. Thus, by and large only cases which had spent some time getting to appellate jurisdictions would be involved, and here great speed would not be a crucial factor. Moreover, counsel should not be expected to keep previously decided issues of Community law open on appeal when the effect of doing so

would be to subject the party involved to the danger of paying what might be substantial court costs incurred in a referral to the Court of Justice. Interpretive decisions always leave the matter of costs to the national judge, who will probably be free under national rules to charge them against a party which has caused a referral to be made by keeping a frivolous issue alive.

However, even given these qualifying factors, the considerable time that referral cases seem to spend in the Court of Justice before decision indicates that some speeding up of the process will be required if an efficient cooperation between the national and Community courts is to be achieved. This difficulty might be solved if the Court were to recognize, contrary to its apparent attitude in Da Costa and Dingemans v. Sociale Verzekeringsbank,¹⁰⁰ that it need not accept all the interpretive referrals that are made to it. Article 177 says that the Court "shall have jurisdiction to interpret," not that it "shall exercise" that jurisdiction. There seems no reason why the Court could not refuse to take jurisdiction in cases where it considers that no substantial question of the interpretation of Community law was involved. In this way any referrals which raised questions that had been answered previously, or that were too obvious to require comment, could be speedily dealt with and the national procedure could get under way again without undue delay.

¹⁰⁰ Case No. 24/64, X Rec. 1259, 1275-76, 2 December 1964.

This, again, is the sort of solution that the Supreme Court of the United States has adopted for dealing with the crushing load of appeals to it from state supreme court and lower federal court decisions. The Supreme Court simply rules that the case is dismissed for failure to raise a "substantial federal question." In the manner that this procedure has come to be used, such a decision does not mean that the ruling below is correct. It only means that for some undisclosed reason the Court does not think it necessary to deal with the question involved. In this way, with no textual authority to rely on, the Supreme Court has made its appellate jurisdiction discretionary in the same manner as its review by writ of certiorari.¹⁰¹

The practice of the U. S. Supreme Court can be criticized because it may be said to involve a denial of justice, but this charge could not be levelled against the Court of Justice. Its role in Article 177 proceedings is not concerned with substantive justice in a particular case but with ensuring the rule of law under the Treaty. Refusal to exercise jurisdiction where the effectiveness of Community law is not affected would not be to shirk that function. Nor should summary dismissal offend national jurisdiction. Such a refusal to exercise jurisdiction would mean only that the national judge could proceed in the light of

¹⁰¹ Schubert, Quantitative Analysis of Judicial Behavior 25-67 (1959).

previous interpretations or the obvious import of the text without fear of overlooking some special problem that might exist from the Community point of view. It would not mean that the referral was improper or unnecessary.

Two types of problems might be presented in adopting these solutions. The first is technical. Under Article 20 of the Protocol on the Statute of the Court, it seems that jurisdiction attaches upon notification to the Court of a decision of stay of proceedings by a national court. The whole extensive procedure of notification to Member States and Community organs, written and oral proceedings, and formal judgment would then seem to be involved in a simple decision that jurisdiction should be declined. However, it is suggested that under Article 92 of the Rules of Procedure, the Court could decide, before the notification to parties process begins under Article 20 of the Protocol, that it lacks jurisdiction in the case on grounds of "public policy," i.e., that an interpretation would serve no useful purpose and would cause delay in the administration of justice.

There is also the technical difficulty of placing sufficient information before the Community Court for it to make an informed judgment about whether an interpretation is necessary. The disparities in the manner of asking questions chosen by national courts and in the scope of the data supplied by them when asking such questions have been considerable. This problem perhaps underlies the

apparent attitude of the Court concerning the necessity of exercising jurisdiction whenever a question of interpretation is referred. In the French phrase, "une Cour unique risque d'etre une Cour inique," but, as we shall see in Chapter VI, the Court of Justice should be able to develop adequate procedures for informing itself on these matters.

The second problem is political. Is it acceptable from the overall viewpoint of Community Court-national court relationships that national courts from which no appeal lies under national law should be deprived of all discretion concerning when they should stay their proceedings in favor of the Community Court's special competence? If so, how is this position to be gotten across to national tribunals? The first question is a bit too broad, for, as we shall see below, inability to determine the substantiality of "questions" will probably not take all discretion away from national courts of last resort. Even if it did, there seems no reason why this should not be acceptable. The language of Article 177, paragraph 3, is clearly designed to require submissions from those courts whose decisions have far-reaching effects in the national legal orders.

The second query is no more difficult. A number of national decisions have expressed the understanding that questions need not be referred if the court plans to follow an outstanding interpretation of the Community

Court.¹⁰² This is obviously reinforced by and sometimes based on the Da Costa attitude, and there is no reason why an opposite approach would not have been, and could not now be, equally effective in influencing national practice. In some places the "cult of jurisdiction" may exist, but there is little if any evidence that national courts are not prepared to adapt themselves to the Community Court's interpretations.¹⁰³ Since their failure to do so might involve the international responsibility of the Member State concerned, there is a strong incentive for compliance.

c. A Community Approach

Yet there is no need to be carried away by comparative analogies. In order to forestall the acte claire problem, one need not accept the whole of the American formal approach to the definition of "federal questions."¹⁰⁴ Indeed, it would seem that in Da Costa, "Rotterdam" and later cases the Court of Justice may already have

¹⁰² See, Alexander, Questions et reponses préjudicielles dans la procédure de la Cour de Justice des Communautés Européennes, Publications de l'Institut d'Études Européennes, No. 8 (Bruxelles, 1964) for a listing of national cases following previous Community interpretations.

¹⁰³ In discussions of means of getting national courts to avail themselves of the Article 177 procedure, education seems to be the major problem, but it may be wishful thinking to assume that it is the whole of the problem. See Speech by M. Sassen, 79 Debats ix/65, p. 224, 17 June 1965.

¹⁰⁴ See, Gaudet, "La coopération judiciaire, instrument d'édification de l'ordre juridique communautaire" in Problems Des Europäischen Rechts: Festschrift für Walter Hallstein 202, 214-220 (1966).

taken the middle ground. The sanctioning of the national court practice of "applying" previous interpretations is not necessarily the approval of the Shell-Berre approach. The Community Court has never suggested that national courts should seek to weigh the "substantiality" of Community law questions in relation to which there has been no previous interpretation.

Moreover, while admitting that a previous interpretation may make a referral otiose, the Court of Justice has not held either that its interpretations are generally binding on all national courts or that further referrals are always unnecessary. The Court may "dit pour droit" in its interpretive judgments, but it recognizes that it does so in a particular factual context.¹⁰⁵ Different situations may require further explication of the rule, and it is always open to a national court to request a reconsideration of a previous decision.¹⁰⁶

Hence it is possible to suggest that developing practice by the Court of Justice and national courts recognizes a distinction between novel questions and those previously referred, but a distinction which does not always result in opposite treatment. In both cases the process of mandatory referral should be actuated whenever there is a

¹⁰⁵ Auguste de Moor v. Caisse de Pension des Employés Privés, Case No. 2/67, XIII-3 Rec. 255, 5 July 1967.

¹⁰⁶ See, e.g., Firma Molkerei-Zentrale Westfalen/Lippe GmbH, Case No. 28/67, XIV-3 Rec. 211, 3 April 1968.

potential issue of the interpretation of Community law.

Such a potential issue exists whenever a party relies on a Community norm, unless there is an outstanding interpretation made in a substantially identical context.

2. Relevance

A second and somewhat related area of "discretion" left to national courts of last resort involves the determination of whether a question of Community law is properly "raised" before the national court. Here again a "classic" doctrinal question has developed concerning the ability of national courts to refer under Article 177 questions of Community law which have been raised d'office: Is a question "raised" before a national court when the court "raises" it itself? This is really a rather academic query. Since the 177 jurisdiction is not one in which there are, in a formal sense, any "parties" before the Community Court, the jurisdiction of the Court of Justice can hardly depend upon what the parties put at issue by their arguments before the national tribunal.¹⁰⁷

The important point in relation to the question of whether an issue of Community law is "raised" in national litigation is the converse of that question. Should

¹⁰⁷ The Court of Justice has answered a question in Caisse Commune d'Assurances "La Prevoyance Sociale v. Bertholet, Case No. 31/64, XI-6 Rec. 111, 11 March 1965, which according to the ordonnance submitted to the Community Court by the Tribunal de Première Instance a Maastricht (1^{re} Ch.) was raised by the latter d'office.

national courts be able to decide that provisions of Community law interjected into a suit are not properly "raised" by the substantive issues involved because the Community law questions cannot affect the judgment of the controversy? In other terms, should national courts of last resort be competent under Article 177 to declare Community law "irrelevant" to litigation before them?

We must begin by admitting that "relevance" is an ambiguous term. It can describe several types of problems which probably should be treated in different ways in adjusting the relationship between Community and national courts under Article 177. Perhaps what is most confusing is that the question of whether national courts should judge relevance is not a complementary question to one of whether the Community Court should do so. In some situations both questions may receive the same answer, and, again depending upon the situation, each question may be answered both 'Yes' and 'No'.

a. "Relevance" in the Court of Justice

The early and important case of N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Netherlands Fiscal Administration¹⁰⁸ sets forth the basic rule: the relevance of the interpretation sought to the decision of the case at the national level is a question exclusively for the national judge. It will not be examined by

¹⁰⁸ Case No. 26/62, IX Rec. 1, 5 February 1963.

the Community Court. The latter's jurisdiction rests solely on the presence of a question of interpretation. This was a firm ruling, coming as it did in a case in which a decision that the basic question referred was irrelevant might have been supported on three separate grounds.¹⁰⁹ Indeed, in the next case in which an issue of relevance was raised,¹¹⁰ the Court did not even discuss the problem, and the Advocate General merely referred to the "precedent" established that the Court had no jurisdiction to review the considerations impelling the national court's referral.¹¹¹

Advocate General Lagrange, among others, has had second thoughts about this rule, and he has questioned whether the Court is bound to give completely abstract interpretations which have no relation to the solution of a problem before the national court, particularly where such interpretations might bear upon matters of importance or create serious conflicts with national jurisdictions.¹¹² However, the Court has continued to state the principle that it is

109 (1) That there was a solution on independent state-law grounds; (2) That an answer to the second question referred might make the first, and most significant, question unnecessary; (3) That the national court would yet be faced with a question of primacy between EEC and Benelux law after the interpretation was given.

110 Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten, Case No. 75/63, X Rec. 347, 19 March 1964.

111 Id. at 372.

112 Costa v. E.N.E.L., Case No. 6/64, X Rec. 1141, 1173-74, July 15, 1964.

incompetent to decide questions of the relevance of its interpretations to the solution of national litigation. However, this "incompetence" must be understood in a somewhat limited sense.

It will be remembered that in Albatros v. SoPeCo the Court gave the national judge a single answer to four connected questions.¹¹³ Clearly, in deriving the overall interpretive question implicit in the national court's submissions, the Community Court had to decide, tacitly at least, what interpretive question was relevant to the national litigation in the light of the questions submitted and of the facts and issues before the national court.¹¹⁴ In so doing the Court may have missed the point. Although the decision gives a concise answer to what the Italian Court seems to be asking, the national judge may have been less interested in a firm general answer than in a rather abstract discussion of the various Treaty articles included in his submissions. The ordonnance¹¹⁵ by which the Rome

113 Chapter IV supra, notes 143-149 and accompanying text.

114 See, e.g., the Court's language at XI-3 Rec. 10:

"[Q]u'il n'y a pas lieu non plus de trancher, en l'espèce, la question de savoir si l'application de l'article 37 aux monopoles nationaux exclut ou non l'application de toute autre disposition du chapitre relatif à l'élimination des restrictions quantitatives entre les États membres, l'effet de l'une et de l'autre interprétation étant identique dans le cadre des données juridiques fournies par le tribunal;"

115 Ordonnance of 18 January 1964, Tribunal Civil de Rome (1^{re} Ch.), p. 6 (polycopié).

court stayed the national proceedings and referred the questions of interpretation makes it clear that its interest in an interpretation by the Community Court is primarily, if not exclusively, based on the necessity of appreciating the reasonableness of the subjective opinion of the defendant concerning the effect of the Community Treaty on the system of French import regulations. The extensive discussion by the Advocate General of the problems involved in the individual and collective interpretation of the pertinent Treaty articles was probably of greater value on this point than the "strictly relevant" answer of the Court of Justice.

The Court cannot really be faulted for bending its rule about relevance in Albatros. The Albatros litigation, including within its context the Shell-Berre case, decided only a few months earlier and concerning basically the same issues, is certainly one of the best examples of the complex political considerations which impinge upon the Court of Justice in the exercise of its jurisdiction under Article 177. The Italian Court had asked questions to which it clearly thought it needed answers. However inartfully questions are framed, the Court of Justice must attempt to give a helpful reply to national courts if that "fruitful collaboration" of which M. Lagrange has spoken is to be developed. On the other hand, as was noted in Chapter IV, the substance of the questions was politically significant. They were directed at a determination of the compatibility of a Member State's acts with its Treaty obligations, and they

arose in private litigation in a foreign jurisdiction. In this context a thorough analysis of the problems involved might have gravely offended the French government. Nor was the French position wholly unjustified. The facts of the Albatros case make it appear an extremely friendly law suit. There is little doubt that, in conjunction with Shell-Berre, Albatros should be viewed as involving an element of "forum shopping" in an attempt to get the Court of Justice to rule on the French import rules. Thus, a thorough analysis might also have been interpreted as a condemnation, and perhaps as a sanctioning, of the French Conseil d'Etat for its failure to refer similar questions in Shell-Berre.

Although it, in a sense, encroached on the Italian judge's jurisdiction by deciding what was relevant for him to know, the Court was faced with a potential conflict of Member State jurisdictions and with the problem of respecting both of them. With perhaps the goodwill of the French government and the whole French judiciary at stake, the Court of Justice seems to have made the best of a very sticky situation. Nor was the Italian Court really left without sufficient guidance. While the Court placated political interests, the Advocate General carried on with a full scale analysis of each question asked. Here, as with other cases involving sensitive or difficult problems, the combination of the opinion with the Conclusions may produce an overall result which takes into account as many interests as

possible by covering the same ground in different ways or with different emphasis.

The Albatros situation brings out a point, for which there is other evidence, i.e., that the whole principle of lack of jurisdiction to investigate relevance is based on "comity" rather than on any immutable precept derived from the nature of the shared jurisdiction. In Wagner v. Fohrmann,¹¹⁶ for example, relevance to the national court's problem was used as an aid in determining precisely what texts the national court wanted interpreted. Both M. Lagrange and the Court found that allowing the Community Court to judge relevance in this case was justified because the national court submission asked for an interpretation not only of the texts specified, but also of all others that would permit it to resolve the litigation.¹¹⁷ Here again the necessity of allowing the shared jurisdiction to establish a fruitful collaboration between national and Community courts makes itself felt. The incapacity of the Court of Justice to examine relevance is absolute only in the sense that the Court has

¹¹⁶ Case No. 101/63, X Rec. 381, May 12, 1964.

¹¹⁷ Id. at 395, 404.

Likewise in Dingemans v. Sociale Verzekeringsbank, Case No. 24/64, X Rec. 1259, 1275, 2 December 1964, the logical connection between the questions asked allowed a determination that a particular answer to one question made the remaining ones irrelevant. Query whether the logical connection must be explicit in the formulation of questions by the national court in order for the Court of Justice to take this approach. Id. at 1288-89 (Conclusions of Advocate General Gand).

decided that it will not dismiss referrals on grounds of irrelevance.

b. National Court Treatment of Relevance

In developing the present Community Court position on relevance, we have treated it as an unitary problem, although the cases involved really were concerned with several different types of relevance. When we turn to a consideration of what national court procedures should be in relation to this question, the discrete types of relevance problems must be examined in more detail.

A rather simple rule based on Article 177 may be formulated as a guideline for national courts whose referral of questions is mandatory: Those courts should forego a referral to the Community Court on grounds of relevance, only when their conclusion that Community law is irrelevant does not presume an interpretation of that law. However, the application of this standard may be more difficult than it appears at first blush.

(1) Irrelevance as a Function of a Particular Interpretation of Community Law

In État Français v. Nicolas¹¹⁸ the French Cour de Cassation, a court which on any reading of Article 177 must be considered as bound to refer questions of interpretation raised in cases before it to the Community Court,

¹¹⁸ October 22, 1964, [1964] Dalloz Jurisprudence 753, 4 C.M.L.R. 36 (1965).

held that no referral to the Community Court need be made because the transactions involved in the litigation were not of a nature to affect commerce between Member States. Hence, the Community competition rules, on the basis of which the defendant had urged the provisional validity of its resale price maintenance scheme, were irrelevant. Clearly this is to interpret what "affecting commerce between Member States" means in the Treaty and the regulations and thus to take an improper approach to the question of when national litigation "raises" questions of Community law.

(2) Irrelevance Based on the General Relationship Between Community and National Law

Indeed there was another ground of irrelevance which could have been invoked in the Nicolas case and which was, in fact, mentioned by the Court below:¹¹⁹ the Cour de Cassation might have refused to quash the appealed decision and to refer questions to the Court of Justice by saying that the only question involved in the case was whether French law had been violated. The defendant was charged with a "refusal to sell" under French law, and whether Community law was or was not also infringed was totally irrelevant. This would have been a more subtle use of relevance but an equally erroneous one; it would implicitly have interpreted the affect on French law of Community law

¹¹⁹ État Français v. Nicolas, Cour d'Appel, Amiens, May 9, 1963, [1963] Dalloz Jurisprudence 556, 2 C.M.L.R. 239 (1963).

in the same substantive area - an area in which the Treaty presumes that an authoritative interpretation of the interaction of Community and national norms is required.¹²⁰

This ~~second~~ possible ground of irrelevance is particularly important in the Community context because a national court decision of relevance or irrelevance in a particular case may presume an interpretation of the overall relationship between Community and national law. This was essentially the problem in Costa v. E.N.E.L. The Italian Government argued that the litigation involved only Italian law, the act ratifying the EEC Treaty and the subsequent law nationalizing the Italian electricity industry. It concluded that the Italian judge had no question of Community law susceptible of an interpretive referral before it and that the referral was, therefore, "absolutely inadmissible." The Community Court rejected this argument because the argument presumed that the Treaty became a part of the national legal order through ratification to the extent that its subsequent status could be determined by unilateral action at the national level. In so doing the Court examined the question of the overall "relevance" of Community law to national judicial decision-making in as much as this question involved the interpretation of the Community Treaty.

Similarly, in van Gend & Loos, where the Court was called upon to determine whether Article 12 of the Treaty

¹²⁰ EEC Treaty, Art. 87(2)(e).

created subjective rights which might be enforced in national courts, the national judge might erroneously have considered that no question of Treaty interpretation was raised because an obligation addressed to Member States was involved - an obligation which could not, under standard rules of Treaty application, be invoked in support of the plaintiff's claim. Fortunately, in both van Gend and Costa the national courts recognized that a determination of whether Community law was properly "raised" by the litigation involved an interpretation of that law - an interpretation not only in the sense of "meaning" but also in the sense of "effect" on the national legal order.

This type of interpretation of Community norms is both peculiarly important to the process of legal and economic integration in the Community and particularly difficult. It is almost wholly purposive rather than linguistic interpretation and hence there is no simple formula by which national courts can be guided. Firma Alfons Lütticke GmbH v. Hauptzollamt Saar Louis¹²¹ is a good example.

There the Finanzgericht des Saarlandes had asked for an interpretation of the direct effect of Article 95 of the Treaty which provides:

A member State shall not impose, directly or indirectly, on the products of other member States any internal charges of any kind in

¹²¹ Case No. 57/65, XII-3 Rec. 293, 16 June 1966.

excess of those applied directly or indirectly to like domestic products.

Furthermore, a member State shall not impose on the products of other member States any internal charges of such a nature as to afford indirect protection to other productions.

Member States shall, not later than at the beginning of the second stage, abolish or amend any provisions existing at the date of entry into force of this Treaty which are contrary to the above rules.

The plaintiff firm had relied on the direct applicability of this text in a suit to recover payment of a compensatory turnover tax which was levied by the German government on the basis of national provisions antedating the EEC Treaty.

The German, Dutch and Belgian governments argued quite plausibly that this was not a situation such as van Gend & Loos where only a "standstill" provision was involved which prohibited the institution of any new measures of discrimination. Here, they said, the third paragraph of Article 95 requires affirmative national action to bring municipal legislation into line with the Treaty. Thus it would be illicit for a national judge to give direct effect to the Treaty as if the appropriate national measures had been taken.

This argument was rejected by the Court of Justice in favor of an interpretation of Article 95 which gave to paragraph one the status of an absolute prohibition whose application was only delayed until the beginning of the second stage, January 1, 1962, by paragraph three. After that time member governments have no discretion concerning

the abolition of the affected levies, and, therefore, national courts will not, in giving direct effect to Article 95, be infringing on the prerogative of national administrations as to the means of carrying out the Community policy. Hence to find that Article 95 is not strictly speaking a standstill provision is not to deny that it may have direct effect in national legal orders. It is only necessary that the provision be of sufficient importance to the establishment of the Common Market, that it contain an unconditional obligation without any margin of appreciation by national governments as to its time of application, and that the norm be susceptible of application without further elaboration by Community or national organs.

Lütticke is, indeed, a decision of signal importance. First, it illustrates how the ability to rely on Community norms and their interpretation by the Court of Justice in national courts tends to minimize the effect of the limited recourse of private parties against their member governments or the Community executives before the Community Court. It was this same plaintiff whose suit to compel the Commission to take action against the German government for failure to abolish the countervailing levies here involved was dismissed in Case No. 48/65.¹²²

Of perhaps greater significance is the potential impact of the Lütticke approach in other areas. A

¹²² XII-1 Rec. 27, 1 March 1966.

number of other articles of the EEC Treaty might be susceptible of the same interpretation.¹²³ Indeed, one might go further to suggest that a similar analysis be made of directives or decisions of comparable clarity and simplicity directed to Member States after the time limit for their execution has elapsed.¹²⁴ This would, of course, require the recognition that no real discretion had been left to national authorities as to implementation and would call in question the propriety of the Executive's use of the directive form or the legality of the act where directives are the only mode of execution available.¹²⁵

However, strong arguments can be made on the basis of Lütticke for a slightly less radical approach with similar effects in respect of certain directives, e.g., those issued under Article 13(2).¹²⁶ These directives might be considered not as having independent normative force, but

¹²³ See discussion by Mailänder, 4 Com. Mkt. L. Rev. 330, 335 (1967).

¹²⁴ See, e.g., Directive of the Council of February 25, 1964 (64/221, EEC), Art. 10, 64/56 J.O. 850, 852-53.

¹²⁵ See discussion in Chapter IV, notes 69-71 and accompanying text, and in this chapter, part I, B, supra.

¹²⁶ See, e.g., directives issued to the German Federal Republic at 65/120 J.O. 2074 and 65/143 J.O. 2437.

Article 13(2) provides in part:

Taxes having an equivalent effect to customs duties on imports in force as between Member States shall be gradually abolished by them during the transitional period. The Commission shall determine by means of directives the timetable for such abolition.

merely as setting the time limit for the coming into force of the unconditional obligation contained in the Treaty. Indeed, should Member States not take the required action and should Article 13(2) not be given direct effect on this basis, the recurrent problem of distinguishing between charges covered by Article 95 and those within the meaning of "customs duties and charges having equivalent effect" would be continued beyond the transitional period. Since the elimination of both types of restrictions might be called the twin pillars of the establishment of free trade in goods, there is a strong policy argument for giving comparable legal force to the norms governing each, even if such an interpretation involves in some sense the giving of direct effect to a directive.

We can at least say on the basis of the Lüticke case that the problem of the general relevance of Community law to litigation in national courts is much more complex than might appear from a reading of the texts involved - even a reading made in the light of previous rulings on the direct effect of Community provisions.¹²⁷ A national

¹²⁷ Advocate General Gand, for example, expressed the opinion in the Deutschmann case, No. 10/65, XI-8 Rec. 601, 8 July 1965, that Article 95 could not be considered as having direct effect.

Unfortunately the French Conseil has failed sufficiently to recognize this danger despite the warnings of Madame Questiaux. See, S. A. Établissements Petitjean, 10 February 1967, [1967] Recueil du Conseil d'État 63.

court must be extremely careful in rejecting suggested Community norms on the basis that it has only a question of national law. It should probably never do so when specific provisions of the Treaty or other Community acts are relied upon by the parties as applicable to their claim.

(3) Irrelevance Based on Qualification of the Problem

Another twist to the question of whether national or Community law is involved in national litigation concerns the qualification of concepts as having a national or a Community content. Thus in the Unger case,¹²⁸ a significant issue was whether "wage earner or comparable worker" in Article 19 of Regulation No. 3 should be interpreted by reference to Dutch social security legislation or Community law. If the former, the plaintiff would not be considered as covered because she was voluntarily affiliated with the scheme. Under Dutch law there was no "legal fiction" by which non-workers could be considered as "comparable workers."

The Court of Justice ruled, however, that in order to effectuate the purposes of Articles 48-51 of the Treaty on free movement of persons, it was necessary that the provisions of Regulation 3 be given an uniform meaning. This could be thwarted by a referral to national law for definitions, and therefore "wage earner or comparable worker"

¹²⁸ Case No. 75/63, X Rec. 347, 19 March 1964. See also, M. Gand's Conclusions in Firma Schwartzwaldmilch GmbH v. Einfuhr-und Vorratsstelle für Fette, Case No. 4/68, XIV-4 Rec. 549, 569-70 (11 July 1968).

must be given a Community content. The Court went on to define the pertinent terms as including any one covered by social security under national law because a worker or because, having been a worker, he was now affiliated with a voluntary social security program.

This decision and its progeny have been roundly criticized as improperly creating a new status of "Community worker," with attendant social security benefits, under Treaty and Regulatory provisions designed only to coordinate the effects of national social security rules on migrant workers.¹²⁹ However, if the impact of Regulation No. 3 is not to extend benefits to certain persons who might not otherwise be covered by any national scheme, it will fail in its purpose. This is necessary to create new rights and in some sense a new "status" - a status which should not depend wholly upon the vagaries of six national schemes, although it is ultimately derivative from them.¹³⁰

Perhaps the more telling criticism of Unger is that levelled, not at the development of an unified Community concept, but at the content of the concept developed.¹³¹ At any rate, the case indicates that the question of whether a Community provision makes a referral to national law, which

¹²⁹ Lyon-Caen, La jurisprudence sociale de la Cour de Justice des Communautés en 1964, 1965 Rev. Trim. de Dr. Eur. 84, 85-87.

¹³⁰ See discussion by Advocate General Lagrange at X Rec. 377.

¹³¹ Lyon-Caen, supra note 129.

would then be controlling, is a question of interpretation which should be submitted to the Court of Justice.

(4) Irrelevance Based on Lack of National Court Jurisdiction

The Costa and van Gend cases also concern a fourth type of relevance problem. There was an issue raised in both cases which concerned, not the meaning of the Treaty or its direct effect in the national legal order, but the jurisdiction of the national courts involved to apply the interpretation given them by the Community Court should that interpretation reveal a conflict between Community and national law. In Costa and in van Gend the Court of Justice stated its established position that this problem did not concern it when giving an interpretation of Community law. But would national courts be justified in refusing to refer questions on grounds of irrelevance to their final judgments because they consider themselves incompetent to apply the answers which they might receive from the Community Court?

Some might argue that this is no longer a problem for national courts. One reading of the Costa case is that the Court of Justice gave the Milan judge a ruling to the effect that Community law is supreme "not only in the Community legal order but also in the national legal orders and that the supremacy rule is directly applicable by national courts, any contrary national provisions regarding

ordinary treaties notwithstanding...."¹³² If it did so, the suggested ground of irrelevance is impossible because the national court will simply apply Community law in case of conflict.

However, it is extremely doubtful that the above-quoted interpretation of Costa is correct. The Court uses language, such as, "preeminence" or "supremacy"¹³³ in discussing the relationship of Community to national law, but these statements must be connected with the conclusions to which they lead in the instant case.¹³⁴ The Court is demonstrating the admissibility of a recourse to Article 177 whenever there is a question concerning the Community treaties. The argument is that the treaties establish a separate legal order which is supreme within its own system, that is, which is unaffected by changes in national law. This separate legal order creates independent obligations for national courts and hence they may use the 177 procedure whenever they are faced with a question of interpretation. However, this is not necessarily to say that the national law has no effect

¹³² Stein, Towards Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case, 63 Mich. L. Rev. 491, 513 (1965).

¹³³ X Rec. at 1158-60.

¹³⁴ The dispositif neatly links the preeminence argument to the use of Article 177: "Les questions posées par la Guidice Consiliatore de Milan en vertu de l'article 177 sont recevables en tant qu'elles portent, en l'espèce, sur l'interprétation de dispositions du traité C.E.E., aucune acte unilatéral postérieur n'étant opposables aux règles communautaires;"

in the national legal system or that the national judge must give preference to Community law. The Italian Government did not claim that national law prevailed over the Treaty; it claimed that the Treaty was national law. Moreover, since the Community Court cannot declare national law invalid or inapplicable, when it is challenged directly under Article 169, it could hardly consider that it had jurisdiction under Article 177 to instruct a national court not to apply conflicting national rules.¹³⁵

There is no denying that the language of Costa is ambiguous, perhaps purposely so, but it is clear that the conflict problem is still a real one for national courts. The Court states quite forcefully the necessity from the Community point of view of equal application of common rules, and makes reference to the theory of "substitution," developed further in M. Lagrange's Conclusions,¹³⁶ which would place the applicability of Community norms on the basis of a recognition that the creation of Community competences results from a parallel cession of competence on the part of Member States. Yet the Avocat General expressly recognized the difficulty created by this theory for national

¹³⁵ This is not, however, to say that the direct effect of Community law is in any way limited by the Article 169-170 procedure. See, e.g., Firma Molkerei-Zentrale Westfalen/Lippe GmbH, Case No. 28/67, XIV-3 Rec. 211, 227 (3 April 1968).

¹³⁶ X Rec. at 1176. See also Lagrange's statements in Semaine de Bruges, Droit Communautaire, Droit National 24 (1965).

courts who consider themselves incompetent to stay the application of national legislation.¹³⁷ These courts may be tempted to avoid generating a clear conflict between national and Community law, and hence a concrete dilemma for themselves, by interpreting their own jurisdiction to exclude the relevance of the Community law.

This is the quite critical problem raised by Syndicat général des fabricants de semoules de France¹³⁸ decided by the French Conseil d'Etat in March of 1968. Plaintiffs attacked certain decisions of the Minister of Agriculture allowing the importation of Algerian grain free of Community levies established by Council Regulation No. 19, effective 1 July 1962. The Minister justified his decisions on the basis of a national ordinance of 19 September 1962, having the force of legislation and requiring internal treatment for such Algerian products. Assuming that the Minister's decisions were authorized by the national measure and that the Community regulation in question applied to products imported from Algeria, there was a clear conflict between Community and national law.

The first assumption obviously raises a question of interpretation of the national measures involved which is within the normal exercise of national administrative jurisdiction; the second should be tested by making a referral to the Community Court, for the Conseil is a court

¹³⁷ X Rec. at 1180.

¹³⁸ 1 March 1968, [1968] Dalloz Jurisprudence 286.

from which no appeal lies. This latter procedure was not used. It was not used apparently because the Conseil considered itself without jurisdiction to review the validity of a national legislative measure except on the basis lex posterior derogat anteriori.¹³⁹ Thus any interpretation of the Community regulation would be irrelevant. Yet, even on the restricted reading of Costa here suggested, this is improper. National courts have an independent obligation to apply Community law, and, therefore, to find such law irrelevant on the ground that they cannot apply it is contradictory and impermissible.¹⁴⁰

M. Lagrange's solution to the dilemma is straightforward: States having such difficulties should amend their constitutions or withdraw from the Community.¹⁴¹ Of Course, in the Conseil, of which M. Lagrange is such a distinguished member, the problem is not "the Constitution" but a "constitutional tradition." This tradition could be modified by a clear textual mandate, but there also seems to be no insuperable obstacle to a recognition that the Community as a juridical fact changes the context within which

¹³⁹ This was the express position of the Commissaire du Gouvernement. Article 55 of the French Constitution gives treaties superior status in relation to national legislation, but the principle that courts may not review legislation for conformity with the Constitution is solidly implanted in the French judicial tradition.

¹⁴⁰ The Community Court has reaffirmed its position on this point in Firma Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn, Case No. 28/67, XIV-3 Rec. 211, 226-29 (3 April 1968).

¹⁴¹ X Rec. at 1180.

this tradition operates and requires its amelioration. Apparently there are analogies in national practice upon which such a recognition could be based, were there a sufficient reorientation of thought in the direction of Community policy and Community responsibilities.¹⁴²

There is also another reason why "lack of jurisdiction" is an illegitimate ground of irrelevance. It presumes an interpretation of Community law which will create a conflict. As the ruling by the Community Court in the Costa case demonstrates,¹⁴³ this interpretation may not be forthcoming, and it may be possible for the national court to decide the case with equal respect for Community and national norms. Moreover, a decision by the national court is not the only means of solving a conflict should it materialize. The Dutch court was never faced with this problem after the van Gend interpretation because, apparently on the strength of the Community Court's ruling, the Netherlands Fiscal Administration repayed the contested sums and the suit was settled.¹⁴⁴

Of course, in some cases an interpretation of the applicability of Community law also answers the national-law question of the applicability of the relevant national

¹⁴² See annotation by Constantinide's-Megret, 4 Rev. Trim. de Dr. Eur. 396-99 (1968).

¹⁴³ See Chapter IV, supra, notes 137-39 and accompanying text.

¹⁴⁴ See Alexander, op. cit. supra note 102.

provisions. A case in point is again Unger v. Bestuur du Bedrijfsvereniging voor Detailhandel en Ambachten. The plaintiff in that case had applied for benefits relating to expenses incurred when she became ill while on a visit to Germany. The Dutch authorities refused payment because, under Article 11(2)(a) of the Dutch social security law, no benefits were payable in relation to foreign medical expenses unless the beneficiary had received previous authorization to reside outside the country during his illness. The plaintiff claimed that this exclusion was inapplicable since the promulgation of Council Regulation No. 3 on the Social Security of Migrant Workers, which in its Article 19 gives wage earners or comparable workers a right to claim benefits under their national schemes where those benefits are required while on a temporary sojourn in another Member State.

In addition to the question of whether the plaintiff should be considered a "wage-earner or comparable worker" within the meaning of the regulation, the national court also specified that it wished to have an interpretation to the extent necessary to determine whether Article 19 of the regulation conflicted with the Dutch law in relation to persons in the plaintiff's situation. In this regard the Court of Justice held that Article 19(1) admitted of no exception on the basis of the reason for going abroad and that it conflicted with any national rule which made the conditions for benefits more onerous when the beneficiary fell

ill in the territory of a state other than that to whose social security scheme he was affiliated.

Referring specifically to the section of the dispositif of the judgment of the Court of Justice which set forth this conflict and to the sections which made Article 19 clearly applicable to persons affiliated to the social security system under the conditions whereby the plaintiff was so affiliated, the Centrale Raad van Beroep, the Dutch Court making the referral in Unger, quashed the judgment and decision which had denied benefits to the plaintiff on the basis that the national law had been improperly applied to her.¹⁴⁵ Although there was a conflict between mutually exclusive Community and national norms, the Community law question - Does Article 19 apply? - and the national law question - Can the national rule be applied? - were two sides of the same coin. To say "yes" to the first was to say "no" to the second because, in the national legal order involved, the Community provision is admitted to be controlling.

Indeed, Advocate General Lagrange described the relationship between Community and national law as presented by Unger somewhat differently. Rather than suggesting the existence of a conflict, he took the more diplomatic approach of saying that Community law might in this instance modify the effect of national law. This, of course, is a correct appreciation of what has occurred and perhaps a more

¹⁴⁵ Decision of 7 July 1964, 1964 C.M.L.R. 546.

helpful one than ideas based on conflict and preemption. In substance the plaintiff in Unger could not rely on Community social security benefits. There are none. The Community institutions may only coordinate the application of existing national programs to the extent necessary to achieve, or at least not to hinder, free movement of workers. This might be thought a distinction without a difference because without the Community regulation the plaintiff had no right to benefits whereas with it she did. On the other hand, it must not be forgotten that with the Community regulation and without the national scheme she also would have received nothing. In classic jurisdiction-sharing style it takes activity at both Community and national levels to produce a single result.

Here, in fact, we see a practical breakdown of the strict theoretical dichotomy between Community and national law. They may both apply to a single substantive issue, not only in a conflicting, but also in a mutually reinforcing manner. But this is not to disprove the dichotomy. In Unger the question was how Community and national law combined to produce an integrated result, because the Community law question was, under national rules, a determinative step in judging the applicability of national law. As we have seen, if the question of the applicability of national law is approached in the national legal order on some basis other than the consideration of what Community law says about its application, the two legal orders tend to come

unstuck.¹⁴⁶ The Costa-type separation of Community and national law questions may preserve the Community Court's power to interpret Community law, but at the same time negate the effect of the Court's interpretation of the applicability of that law.

(5) Permissible Areas for the Appreciation of Relevance by National Courts

Are there, then, any situations in which a national court of last resort might be justified in finding that a suggested question of Community law is not "raised" by the litigation? Well, certainly on national procedural grounds it may be decided that the Community law question has not been properly presented by the pleadings or the record. But, here again a warning note must be sounded. Particularly in proceedings of a cassatory nature it may be very easy for the reviewing court to find that no question of Community law is before it by misconstruing the bases of a contested decision or by taking it at face value. This may have occurred, for example, in a case before the Dutch Supreme Court. The plaintiff sued for a preliminary injunction in support of its patent rights to be met by the defense that such enforcement would allow the abuse of a dominant position within the meaning of Article 86 of the EEC Treaty. The trial court refused the injunction because of its

¹⁴⁶ For the constitutional position of the EEC Treaty in the various national legal orders see generally, Bebr, *Judicial Control of the European Communities* 216 (1962).

far-reaching effects in a situation where "new developments in the law of competition" made it unclear whether the plaintiff could get full enforcement of its patent rights.

The appellate court affirmed this ruling on the grounds of the doubtfulness of the eventual outcome of the trial of the main cause, which might involve a referral to the Court of Justice. Finally the Dutch Supreme Court refused to quash the appellate decision on the basis of a misinterpretation of Article 86, saying that the appellate court had placed no interpretation on that article.¹⁴⁷ But did not the appellate court have to place some interpretation on Article 86 in order to determine that the defense was sufficiently plausible to deny the injunction? Or, are Dutch courts going to deny preliminary injunctions every time defense counsel is resourceful enough to suggest that a treaty article is involved? If not, was there not a question of interpretation before the Supreme Court which should have been referred to the Court of Justice?

The Hoge Raad was not clearly in error in this case. If under national procedural rules the state of the record would not have allowed reversal on grounds of misinterpretation of the Treaty, an interpretation from the Court of Justice could have served no useful purpose, and the Dutch Court was correct in not considering that a

¹⁴⁷ *Constructa Werke GmbH v. De Geus en Uitdenboger N.V.*, Hoge Raad, 10 April 1964, [1964] *Nederlandse Jurisprudentie* 1121, [1965] *C.M.L.R.* 17.

question of Community law was raised before its. On the other hand, if, for example, the Cour de Cassation had cast its refusal to quash the contested judgment in Nicolas in the form that there could have been no misconstruction of the Treaty in the court below because no construction had been made, the situation would have been quite different. Here the same fault could be found with the decision, based ostensibly on national procedural grounds, that was found with the actual Nicolas decision.¹⁴⁸ The failure to "raise" the question under national procedural rules would camouflage an interpretation of the Treaty. These situations must be distinguished from those in which no position on a point of Community law is being taken because some national procedural rule has barred the introduction of the issue into the litigation or has caused it to be absent from the record on appeal.

A national court may also legitimately decide that, because of the facts of the litigation, its resolution of the dispute must be the same whatever interpretation might be placed on the Community-law provision in question. Thus, in Waldemer Deutschmann v. German Federal Republic¹⁴⁹ the plaintiff claimed that the collection of a certain German tax violated Articles 9, 12, 30 and 95 of the EEC Treaty. In its referral to the Court of Justice the

¹⁴⁸ See discussion supra at note 118.

¹⁴⁹ Case No. 10/65, XI-8 Rec. 600, 8 July 1965.

Verwaltungsgericht, Frankfurt, asked only for an interpretation of Article 95. Articles 9 and 30 were excluded from the referral on grounds that we have considered illegitimate; Article 30 was said to be clear and inapplicable to the facts (i.e., no "question" raised) and Article 9 was irrelevant because no question of lack of conformity with implementing directives had been raised (i.e., Article 9 interpreted as having no direct effect).¹⁵⁰ On the other hand, Article 12 was rightly excluded on factual grounds. Since 1958 there had been no change in the tax, and hence on any reasonable interpretation of Article 12, that provision could not have been infringed.¹⁵¹ On the other hand, even here it might be argued that a determination of irrelevance in some degree prejudices the interpretation of the Treaty. This is true, but it only illustrates that in the end even severe limitations on national court discretion leave areas in which that discretion must operate.

C. Concluding Comments

It may be thought that the suggestions made above concerning national courts which are bound to make referrals to the Community Court are rather strict and mechanical. This is not denied. If the Court of Justice is to have any real unifying effect on the interpretation and application of Community law in the national legal orders - and largely

¹⁵⁰ Ordonnance of 9 February 1965, Verwaltungsgericht, Frankfurt/Main, p. 5 (polycopié).

¹⁵¹ Ibid.

this means interpretation and application by the most important elements of national judicial systems, national trial courts - it is submitted that a strict construction of the referral duty of national courts exercising supervisory jurisdiction in the national legal orders is a necessity.

A contrary argument may certainly be made. The Court of Justice depends upon the cooperation of national courts and that cooperation may in turn depend upon a flexible attitude by the Community Court. It is, perhaps, an affront to reasonable men to tell them that they should not exercise their powers of reasoning to forego referrals that seem to be a ridiculous waste of time. Moreover, might not rigidity by the Court of Justice in relation to national courts which fall within Article 177, paragraph 3, result in fewer referrals by national courts which have no obligation to make them?

To take the second point first, the answer may be "yes", but does this matter? We have already questioned whether attempts to influence lower courts to make greater use of the referral jurisdiction can be successful or, in the long run, even desirable. The important element from the point of view of giving the Court of Justice sufficient influence on the development of a unified Community law within the various national legal orders is to make certain that national courts exerting supervisory control within the national judicial hierarchy receive the "authentic" rulings of the Court of Justice. Control at the top of national

judicial orders will filter down to the lower eschelons even if the latter maintain an exclusively "national" mentality.

Nor should a rigid approach in this instance be an affront to national jurisdictions. To say that any discretion concerning the exercise of the Community Court's jurisdiction under Article 177, paragraph 3, should be exercised by the Community Court is only to maintain the clearly exclusive jurisdiction of that court to interpret Community law. The shared jurisdictional system leaves the parties and the case as a whole, including its national law elements, exclusively within the jurisdiction of the national courts. As we shall see in the following chapter, this division of function leaves significant power over the development of Community law in the hands of national judiciaries. The necessity of flexibility in building up M. Lagrange's "fruitful collaboration" is not denied, but it must be recognized that to have any "collaboration" at all the Court of Justice must be involved in the decision-making process. Strictness in interpreting Article 177, paragraph 3, seems appropriate under the system and can, through the implementation of the "streamlining" techniques suggested above, or some similar schemes, be made to provide an efficient administration of justice. These are, at least, less radical suggestions than some have made, for example, that private parties be given an immediate direct appeal to the

Court of Justice from a national court determination not to refer questions.¹⁵²

¹⁵² See intervention of Pescatore in the Liège Colloquia, La Fusion des Communautés Européennes 281-83 (1965).

CHAPTER VI: The Technique of Judicial Jurisdiction Sharing

The problems that were encountered in Chapter V in educating or inducing or compelling national courts to "share" suits involving questions of Community law with the Court of Justice and concerning the restricted scope of that court's jurisdiction to interpret "Community law" are difficult ones. Moreover, there is not a great deal that the court can do directly to solve these problems. The suggestions that have been put forward represent, perhaps, the outer limits of what might be politically feasible in increasing the court's control. Certainly, some might say that they go outside those limits.

However, as we turn now to the division of functions between Community and national courts in situations where questions of interpretation have been submitted under Article 177, the Community Court's control over its own jurisdiction is vastly increased. What the court does or says in a particular case concretely establishes its relationship with a particular national court and their respective control over specific issues of Community law. The practices developed, of course, may also affect the attitudes of other courts and thus the subsequent opportunity of the Court of Justice to deal with other interpretive questions. But, this prospective effect is only one of the considerations that the court must take into account in interpreting its powers. As we noted in Chapter V, no one has produced any concrete data tending

to show that a restrictive approach by the court to the scope of its competence to interpret will produce a greater degree of cooperation by national courts, and a rather persuasive argument can be made the other way.

Leaving this problem aside for the moment, we must ask what division of control over Community law has been developed between the Court of Justice and national courts referring questions under Article 177 and upon what criteria that division is based.

I. A Division of Function Based on Linguistic or Technical Criteria

A. Interpretation - Application

It has been widely accepted that the definition of the Community Court's function under Article 177 as "interpreter" of Community law excludes the correlative judicial function of the "application" of that law. That function is left to the national court. It is certainly true that the Court of Justice cannot give a judgment in an Article 177 case which sets forth how the relevant Community provisions affect the substantive rights of the parties, but this proposition could be derived from the fact that the Community Court is giving a "preliminary," not a definitive, ruling in the case. Our question really concerns the degree of control exercised respectively by Community and national courts over the "meaning" of Community texts as applied to the facts of particular cases, excluding issues of national law which effect the eventual outcome.

To say that control over the subsumption of facts under a legal rule is to be allocated on the basis of a distinction between interpretation and application does not get us or the court very far toward an answer. A moment's reflection reveals the limitations of such a distinction. Obviously, application involves interpretation and interpretation is of little use unless it indicates to what situations the law applies. According to Radbuch, "L'interprétation consiste non pas simplement à retrouver la signification primitive d'un instrument juridique mais à lui donner toujours sous réserve du respect du text la signification spécifique que postule son application pratique; non pas seulement à 'repenser'; mais à achever de penser une idée."¹

Apparently recognizing both the difficulty of separating "interpreting" and "applying" into discrete functions and that the distinction is designed to separate the legal and factual elements of a decision, the Advocates General and certain of the Member States have attempted to clarify the division of jurisdiction under Article 177 by describing the Community court's role as that of rendering "abstract" interpretations.² To the extent that this

¹ Quoted in Pepy, Les questions préjudicielle dans les Traités de Paris et de Rome et la jurisprudence de la Cour de Justice de la Communautés Européennes, [1965] Cahiers de Droit Européen 194, 200.

² See, e.g., M. Lagrange's Conclusions in Société Kleding-verkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch, GmbH, Case No. 13/61, VIII Rec. 89, 126, 6 April 1962, and the submissions of the French Government in Albatros, XI-3 Rec. at 6.

description is meant to indicate the inability of the Court of Justice to prescribe the concrete legal consequences of its interpretation when applied by the national courts, it is unquestionably correct. However, it has become increasingly obvious that in concrete instances the division of functions between Community and national courts cannot be predicated solely on definitional distinctions which allocate jurisdiction in terms of capacity to deal with factual elements in the litigation.

Advocate General Roemer attempted to make this sort of distinction by defining "application" as the determination of whether certain facts come within a certain legal rule and of the facts which result from that subsumption.³ But, he was forced to note at the same time the difficulty of distinguishing such "application" from "interpretation" which is limited to a narrow point and which has been made in the context of factual submissions by the national court. The problem is summed up by M. Lagrange's Conclusions in Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten when he says,

"Gentlemen, in this case as in all cases brought under Article 177, the Court of Justice is bound to give an abstract interpretation of the texts submitted to it.... One must not, however, forget that the Article 177 procedure always takes place within the framework of a suit and that the substantive aspects of the suit frequently shed light on the matter

³ N. V. Algemene Transport-en Expeditie Orderneming van Gend & Loos v. Netherlands Fiscal Administration, Case No. 26/62, IX Rec. 1, 49, 5 February 1963.

involving an abstract interpretation, as does an example in support of a theory. Of course, in court, the example is not chosen by the theoretician, but is thrust upon the judge as reality."⁴

Moreover, if the court fulfills the sort of constitutional role that has been described for it, an inability to consider in any way the application of its interpretations to particular facts would seem inappropriate. "Constitutional problems of federalism are likely to present issues of judgment which cannot be solved wisely by mere examination of verbal texts, but which require the fullest possible understanding of the ... legislation in the context of social and economic facts."⁵

To return to the practical level, we know from the discussion of the Albatros litigation in Chapters IV and V that the Court of Justice will derive questions which are within its jurisdiction from questions submitted by national courts which are outwith that jurisdiction, and that in so doing it must be influenced by the factual data supplied by the national court. This is not a practice reserved for politically difficult cases. In the first case submitted under Article 177 the Court decided explicitly that national courts could refer their questions in a simple and direct form from which the Court would develop interpretive questions

⁴ Case No. 75/63, X Rec. 347 at 372-73, 19 March 1964.

⁵ Freund, "The Federal Judiciary" in *Studies in Federalism* 110 (1954).

using the legal data submitted.⁶ To talk in terms of "abstract" interpretation is to ignore one of the basic practical requirements of the 177 jurisdiction: the necessity of using the facts of 177 cases to develop the meaning of the questions asked.⁷

Nor does the Court's use of the factual data stop with the development of questions which have been "inartfully" drafted. It tends to give answers to preliminary questions which are formulated with reference to the facts. In the Unger case, for example, the national court had asked whether persons in the plaintiff's position were covered by the term "wage earner or comparable worker" in Regulation 3 on the Social Security of Migrant Workers. The Court of Justice generalized this question into one of the definition of "Wage earner or comparable worker,"⁸ but its definition described exactly the sort of situation in which the national court had indicated that the plaintiff found himself.⁹ Moreover, as later interpretations have revealed,¹⁰ the

⁶ VIII Rec. at 102 (Bosch).

⁷ See particularly the Court's statement in Auguste de Moor v. Caisse de Pension des Employés Privés, Case No. 2/67, XIII-3 Rec. 255, 267, 5 July 1967, and Advocate General Roemer's suggestion in Cossutta v. Office National des Pensions pour Ouvriers, Case No. 18/67, XIII-4 Rec. 399, 409, 30 November 1967, that the Court might under certain circumstances request further elucidation of the facts by the referring court.

⁸ X Rec. at 363.

⁹ X Rec. at 364.

¹⁰ E.g., Caisse commune d'assurances "La Prevoyance Sociale" v. Bertholet, Case No. 31/64, XI-6 Rec. 111, 11 March 1965.

concept of "travailleur salarié ou assimilé" in the regulation may have a broader meaning than the one given in Unger. Indeed, one could easily trace the effect of the factual data submitted on every interpretation given by the Court of Justice, and in a few cases the Court has answered fact-based questions with a simple "la réponse à la seconde question du tribunal --- doit être affirmative."¹¹

This is not, of course, to say that the Court of Justice denies the legitimacy of a division of competence between itself and national courts based on a distinction between interpretation and application.¹² It is only to say that the Court seems to recognize the inherent flexibility of the distinction. This flexibility leads inevitably to an attempt to analyze the real division of functions between Community and national courts by refining the technical distinctions used in the analysis.

B. The Bosch-Opsahl Hypothesis

In this regard a rather promising hypothesis was put forward by Professor Opsahl in 1963. He suggests a division of the judicial function in applying legal rules into three processes: (1) interpretation, (2) fact determination, and (3) subsumption of facts under the interpreted rule.

¹¹ Betriebskrankenkasse der Heseper Torfawerk, GmbH v. Van Dijk, Case No. 33/64, XI-6 Rec. 131, 141, 11 March 1965.

¹² See, e.g., the Court's language in Da Costa en Schaake v. Netherlands Fiscal Administration, Cases Nos. 28-30/62, IX Rec. 59, 76, 26 March 1963.

Applying this to the Community context Opsahl suggests that the Community Court has the interpretive power in an abstract sense, national courts retain fact determining power, and the locus of the power of subsumption is an open question. The latter is a process common to both jurisdictions, and who does the subsuming seems to depend upon the measure of fact supplied to the Community Court by the national jurisdiction.¹³

This argument is clearly based on various elements of the Bosch¹⁴ case: a combination of the language of the Advocate General, which stressed the "abstractness" of the Court's interpretive power,¹⁵ with the language of the Court, which indicated that it could not answer the question posed in precisely its original form because it had not been supplied with sufficient facts to make a proper determination.¹⁶ Later cases may also be used as authority for the type of concrete division of functions with a variable "subsumption" element which Opsahl has described. As far as it goes (and since Opsahl only had one case to work with, it cannot be expected to go too far), the Opsahl hypothesis is reasonably

¹³ Opsahl, National Courts and the Community Court under Article 177 of the EEC Treaty, in Legal Essays - A Tribute to Fred Casberg 280, 294-97 (1963).

¹⁴ Société Kledingverkoopbedrijf de Geus en Uitdenboger v. Robert Bosch, GmbH, Case No. 13/61, VIII Rec. 89, 6 April 1962.

¹⁵ Id. at 126.

¹⁶ Id. at 106.

descriptive of the way in which the 177 jurisdiction has worked. However, an examination of the various elements of the division of function suggested will reveal, not only the manner in which the Court uses its jurisdiction to interpret, but also the limitations of this or any attempt at a rigid division of function between Community and national courts.

1. Fact Determination

To begin with, Opsahl's divisions of functions may be questioned. His allotment of fact-determining power to national courts accords with the language of the Bosch decision,¹⁷ but that language is vaguely disturbing. Why the Court of Justice denied its capacity to take a preliminary examination in the Bosch case, when only one month earlier it had brought into effect rules of procedure which clearly make preliminary investigation applicable to 177 proceedings,¹⁸ is difficult to understand. Perhaps the Court has decided not to use its investigatory powers in Article 177 cases. To this writer's knowledge the procedure has never been applied in a referral context, although oral hearings are regularly held, and in Nonnenmacher v. Bestuur der Sociale Verzekeringsbank¹⁹ the Court seems to admit the

17 VIII Rec. at 106.

18 See Rules of Procedure, Art. 103.

19 Case No. 92/63, X Rec. 557, 9 June 1964.

possibility of having an instruction.²⁰ A widely-quoted thesis by R. M. Chevallier argues that the instruction and oral hearing are redundant in the 177 context because they are concerned primarily with the development of facts which cannot be used by a court rendering abstract interpretations.²¹ If the inevitability, indeed, the necessity for making some use of factual data is accepted, and the practice of the Court seems too clear on this point to admit of doubt, this argument must be rejected.

M. Chevallier's proposals are, of course, not so naive. His thesis, like many of the notes and articles he has published, seems directed at inducing French judges to make use of the 177 procedure. One certainly gets the impression that he is deliberately playing down the flexibility of that procedure in order to convince a particular national judiciary that they will not relinquish significant power over their cases by submitting question to the Community Court. This is really a quite separate "political" argument in favor of a limitation of the Court's interpretive function, and while the Court's practice goes beyond what

20 Id. at 567. (This is also the first reported use of the juge rapporteur. His function in 177 cases is to produce a coherent summary of the data submitted by the national court and the arguments made by parties eligible under Article 20 of the Protocol.)

21 Chevallier, *Commentaire de l'article 177 du Traité C.E.E. a l'usage des juges et des justiciables français* 115-124. Thèse, Paris, 1964. (polycopié)

Chevallier would call "interpretation," its failure to employ the instruction may well be based on this type of consideration.

The problem, of course, is that consideration of the effect of the Court's use of fact on its subsequent opportunity to interpret may lead to an opposite conclusion from M. Chevallier. If the Community Court does not sufficiently appreciate the factual context of a particular referral to give relevant and helpful interpretations, national judiciaries may decide that referrals are a waste of time and money.

At any rate failure to make use of the instruction has not meant that the Court always accepts only the factual data supplied by the national courts. In Nonnenmacher, for example, the Court notes among the operative facts the receipt from the plaintiff of two documents tending to prove that she was not entitled to a pension under the French social security scheme.²² This fact bore directly on the second part of the question of interpretation submitted by the national court, a point which became irrelevant after the Court's treatment of the first part.²³ More concretely, the Court decided that Regulation No. 3 did not in general prohibit payment of social security benefits to one party from

²² X Rec. at 566.

²³ Id. at 574-75.

more than one Member State, and thus did not reach the narrower issue of whether there might be an exception to the alleged prohibition of such cumulative payments where the worker failed to qualify under the national scheme made applicable by Article 12 of the Regulation. In Wagner v. Fohrmann²⁴ the Court asked two questions of the European Parliament and received some factual information from it,²⁵ and in Firma C. Schwarze v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel,²⁶ the Court uses an admission by the Commission in its submissions to establish a relevant fact.²⁷ However, since the latter case involved a referral on validity framed as an interpretive referral, not too much weight can be given to its procedural quirks as indications of accepted "interpretive" practice.

Another of the seemingly endless aspects of the Albatros case might be brought in here. Although the Court said that its interpretation applied to all of the national court's questions and hence that they need not be treated separately, the terms of the dispositif in that case

²⁴ Case No. 101/63, X Rec. 381, 12 May 1964.

²⁵ Id. at 391. Query to what use this information was put or to what end the Court asked the questions in the first place. The first seems concerned with whether the immunity issue is now moot and the second with obtaining a legal opinion from the Parliament, which complied by sending information relevant to such an opinion.

²⁶ Case No. 16/65, XI-10 Rec. 1081, 1 December 1965.

²⁷ Id. at 1097.

do not cover one of the questions referred. To say that "none of the dispositions of the Treaty envisaged by the home tribunal imply the complete abrogation from the effective date of the Treaty of all quantitative restrictions, discriminations or measures of equivalent effect existent at that date, nor do they oblige the state to suppress them completely by 1959,"²⁸ is not to answer the national court's question of whether those provisions have a "standstill" effect preventing the introduction of new restrictions, here allegedly contained in the French ordonnance of 24 September, 1958.²⁹ The Court could, perhaps, have justified the omission of this question on grounds that it involved the interpretation of national law,³⁰ but it did not do so,³¹ at least not explicitly. For this reason it is suspected that the Court may have accepted the Commission's suggestion³² that the French regulation in question was totally irrelevant to the lawsuit because the denial of an import license had in no way been predicated on it. If so, the Court made use

²⁸ XI-3 Rec. at 11. (Translation is mine.)

²⁹ This was the national court's question 'B'. XI-3 Rec. at 4.

³⁰ As did the Advocate General. XI-3 Rec. at 23.

³¹ The only conclusion that the Court draws from the enunciation of the rule that it may not interpret national law is that it is therefore not appropriate to discuss whether the French import scheme constitutes a national monopoly. XI-3 Rec. at 9.

³² XI-3 Rec. at 5-6.

of data which, not only was not submitted by the national court, but which seemed to contradict the national court's understanding of the facts of the suit.

2. Interpretation

The allocation of sole interpretive power to the Court of Justice in 177 cases also meets with some difficulty. For one thing national courts may exert an influence over the interpretation given by the manner in which they submit referrals. If the Court of Justice is hesitant to use the instruction procedure and yet gives interpretations within the context of specific facts, the national court's selection of pertinent facts and legal arguments must certainly affect the Community Court's decision. Further, national courts may specifically suggest what the answers to their questions should be, and while those submissions do not bind the Court of Justice in any way, they will probably at least impel the Court to substantiate a contrary conclusion with particular care.³³

There is also the problem that any referral from a national court requires some interpretation by that court of the provisions referred, some elimination of

³³ See discussion in Chevallier, op. cit. supra, note 21 at 178-180.

The ordonnance of the Hessisches Finanzgericht of 26 February 1965 in the Schwarze case is a good example of referral questions with suggested answers. (Mimeograph on file at Court of Justice, Luxembourg.)

inapplicable texts.³⁴ Advocate General Roemer has suggested that the Court could not accept a completely general referral which merely set forth the facts and arguments and asked for an interpretation of any applicable Community provisions.³⁵ Nor should national courts be expected to make referrals in this manner. They submit specific provisions for interpretation, and this necessarily requires some selection of potentially applicable texts.

This selection is in general binding on the Community Court. We have noted that the parties or others concerned in the 177 procedure are not allowed to expand the questions asked by the national court.³⁶ Nor generally is the Court of Justice capable of doing so,³⁷ at least not to the extent of bringing in additional provisions which do not bear on the interpretation of the texts submitted.³⁸ In

³⁴ This was explicitly recognized by the Milan Justice of the Peace in his referral decision of 16 October 1963 in Costa v. E.N.E.L. (Mimeograph on file at Court of Justice, Luxembourg.)

³⁵ Cf., N. V. Internationale Credit-en Handelsvereniging "Rotterdam" v. Minister of Agriculture and Fisheries, Case No. 73/64, X Rec. at 51, 18 February 1964. (This was a referral on a question of validity rather than interpretation, and Herr Roemer does admit of an "extensive interpretation" of the questions referred.)

³⁶ See Chapter IV supra, note 77 and accompanying text.

³⁷ This would agree with French referral procedure. See, e.g., Heurté, Le Recours sur renvoi des Tribunaux Judiciaires, 1958 Actualité Juridique 111, 113-14.

³⁸ This latter practice is, of course, a necessary part of rendering the interpretation requested. See, e.g., the Court's treatment of the context of Article 12 of the Treaty in van Gend & Loos, IX Rec. at 22-24.

Wagner v. Fohrmann³⁹ the Court went into additional and un-referred texts at the invitation of the national court, but even there the additional provisions were directly related to the interpretation of those specified.

Admittedly, the Court of Justice has not ruled directly on its ability to raise questions of additional provisions d'office, but its treatment of the problems in Dekker v. Bundesversicherungsanstalt für Angestellte⁴⁰ indicates that it recognizes this limitation. In that case it seems that the plaintiff was covered by a German old age pension which included the payment of contributions for sickness insurance. However, when the plaintiff, who had been resident in Holland since 1958, transferred his sickness insurance from a German to a Dutch Agency, the German pension authorities refused further contributions. The plaintiff sued for reinstatement of his right to contributions, and the question referred by the national appellate court was whether the contribution to insurance premiums was, as the lower court had held, included within the meaning of "prestations en nature" of Article 22 of Regulation 3 which would require payment of such benefits to the plaintiff although he was affiliated with an insurance plan in another Member State. It was reasonably clear that "prestations en nature"

³⁹ See Chapter V supra, notes 116 and 117 and accompanying text.

⁴⁰ Case No. 33/65, XI-10 Rec. 1111, 1 December 1965.

referred to benefits accorded after the risk - here sickness - materialized, not to payment of insurance premiums, and the Court found little difficulty in simply answering the question in the negative.⁴¹

The problem with this case is that the wrong provision may have been referred. What should have been investigated was, not whether Article 22 of Regulation³ affected the application of the sickness plan, but whether Article 10 of the Regulation affected the application of the pension scheme in such a way that a change of residence and situs of insurer to another Member State cannot be invoked to terminate the benefits payable. But, as the Advocate General pointed out, this question was not asked and the Court could not examine it.⁴²

At this point the problem raised by the Dekker case may seem very familiar, i.e., that the Court of Justice cannot interpret Community law unless national courts recognize that a question of interpretation exists. However, this failure by a national court to refer a relevant provision in the context of its referral of other provisions may have a slightly different type of effect than has a simple failure to refer any interpretive questions. Here the interaction of two interpretations may, in effect, subvert the meaning of the Community Court's ruling. Because the

⁴¹ Id. at 1117.

⁴² Id. at 1121.

national judge must tend to combine his initial interpretation of potentially applicable provisions with the interpretation given by the Court of Justice, the national court may think it has received an answer which has not been given. In Dekker such a combination produces the impression that the Community rules on social security do not require the continuance of the contested payments, whereas the Court of Justice might have come to the opposite conclusion had the national court framed its question to include Regulation No. 3 as a whole. Such misunderstandings would be particularly serious were the question one of validity rather than interpretation. Herr Roemer has suggested that the Court should not consider itself confined to an examination of the issues raised by the national court's referral in such situations.⁴³

Indeed, it is always possible for national courts to misunderstand an interpretive decision and, thus, to negate the effective power of the Court of Justice to control the interpretation given to Community law in a particular case. Nor is such an effective negation unimportant. We noted earlier that, although the Court's interpretations may be given a wider force, they are generally considered to be "binding" in the strictest sense only on the national court submitting the questions. If the Court of Justice does not effectively control the interpretation

⁴³ Firma Max Neumann v. Hauptzollamt Hof/Saale, Case No. 17/67, XIII-5 Rec. 572, 597, 13 December 1967.

of a Community provision in the specific case in which that interpretation is given, it is deprived of any binding power to interpret at all. Here then is another reason why interpretation must be tied reasonably closely to the facts of specific litigation: the more abstract the interpretation the greater chance of misunderstanding by the national court and hence of a failure by the Court of Justice effectively to fulfill its interpretive role.

3. Subsumption

This consideration brings us to the third function described above, subsumption of facts under the operative rule, and to an investigation of the extent to which the sharing of the subsumption function is based on the factor indicated to be controlling in the Bosch case - the completeness of the record submitted by the national court. To a certain degree, of course, the Bosch statement is refuted by the ability of the Court of Justice to develop its own factual record and its occasional practice of admitting facts other than those submitted by the national court. Instances may also be cited in a contrary direction, that is, where the Court gives a less fact-oriented interpretation and hence assumes less of the subsumption function than the submissions of the national court or the development of the case on oral argument would seem to allow.

The manner in which the Court of Justice generalized the specific question asked in the Unger case has

already been mentioned.⁴⁴ The answer was still related to the facts of the case, but related to them in the sense of a general, hypothetical situation rather than to the specific parties involved, although the total "context" of the litigation in the Bosch sense seems to have been before the Court.⁴⁵ The Court might simply have said "the provision applies to people in the petitioner's position." Again in Wagner v. Fohrmann⁴⁶ the national court apparently wanted a concrete determination of whether European parliamentary immunity applied to certain persons on a specific date, but the Court of Justice merely instructed it how it might make the determination for itself.⁴⁷ Costa v. E.N.E.L.⁴⁸ might also be brought in here. A comparison of the Conclusions of Advocate General Lagrange⁴⁹ with the Court's decision⁵⁰ reveals that,

⁴⁴ See notes 8 and 9 supra and accompanying text.

⁴⁵ In Unger the Dutch appellate court sent a memoire to the Court of Justice which set forth the facts of the case, the legal issues and the questions of Community law that it wanted answered. Annexed to the communication were (1) the judgment of the lower Dutch court, (2) the appellate pleadings of the petitioner including a special argument on the point referred to the Community Court, (3) a proces verbal of the portion of the audience on appeal which dealt directly with this point, and (4) the appellate court's decision to stay proceedings pending an interpretation from the Court of Justice.

⁴⁶ Case No. 101/63, X Rec. 381, 12 May 1964.

⁴⁷ Id. at 390 (first paragraph).

⁴⁸ Case No. 6/64, X Rec. 1141, 15 July 1964.

⁴⁹ Id. at 1188-1190. (It seems that M. Lagrange got most of his "facts" on this question from submissions made under the provisions of Article 20 of the Protocol in the Statute of the Court.)

⁵⁰ Id. at 1165.

while the former thought the facts developed warranted an interpretation of whether an electricity industry such as the Italian one could be considered as coming within the meaning of a prohibition aimed at "commercial" monopolies dealing in products subject to exchange between the Member States, the latter leaves this determination to the national judge.

The practice in recent social security cases⁵¹ of giving answers in the motifs simply in the positive or in the negative after developing a more abstract interpretation does not necessarily indicate that the Court of Justice is shifting to a firm position of performing the subsumption function in decision making to the full extent permitted by the "legal data" referred by the national court. The questions submitted in these cases reveal that national courts are becoming more adept at asking interpretive questions within a factual context but without framing those questions solely in terms of the litigation before them. Thus, in Unger the national court had asked whether a certain provision applied "to persons who find themselves in the situation described as concerns the petitioner"⁵² whereas in the later

⁵¹ See, e.g., *Hessische Knappschaft v. Maison Singer et Fils*, Case No. 44/65, XI-11 Rec. 1191, 1200, 9 December 1965; *Dekker v. Bundesversicherungsanstalt für Angestellte*, Case No. 33/65, XI-10 Rec. 1111, 1117, 1 December 1965; *Betriebskrankenkasse der Heseper Torfwerk GmbH v. Van Dijk*, Case No. 33/64, XI-6 Rec. 131, 140-41, 11 March 1965; *Caisse Commune d'assurances "La Prevoyance Sociale" v. Berthelot*, Case No. 31/64, XI-6 Rec. 109, 118-19, 11 March 1965.

⁵² X Rec. at 376.

Bertholet case the national court asked whether a provision was applicable "where the domicile of a worker and his place of work are situated in the same Member State, in this case Eupen and Kessenich in Belgium, although geographically these two places are situated in a fashion that the road habitually used by the worker between his domicile and place of work and back crosses the territory of another Member State, here Holland?"⁵³ To say "yes" to this latter question is not necessarily to appropriate any more of the subsumption function than the sort of ruling that has been described above in Unger.⁵⁴

This variation in the manner in which national courts ask questions and the necessity in certain cases of reframing these questions to bring them within the Court's 177 jurisdiction make it very difficult to make precise comparisons between cases in terms of exactly how much the Court of Justice is limiting or expanding the discretion national courts might exercise in applying an interpretation of Community law to the facts before them. However, the foregoing illustrations make it reasonably certain that variations in the Court's use of fact do not necessarily turn on the amount of background the national court or others have supplied. Considerations other than those of a technical nature must

⁵³ XI-6 Rec. at 113.

⁵⁴ See also the technique of framing questions in the other cases cited in note 51 supra.

be playing a part. The question is on what basis flexibility is introduced into the division of functions between Community and national courts in an Article 177 proceeding.

II. The Flexible Approach

In rather free translation, it is suggested that the following language from the Schwarze case represents, in its most general form, the attitude of the Court of Justice concerning the extent of its jurisdiction to answer preliminary questions requiring an interpretation of Community law and, hence, the balance of power between itself and national courts to control the application of that law. The Court said that:

If a ... formal rigor is conceivable in contentious procedures among parties whose reciprocal rights must be made to conform to strict rules, this is not so in the very singular framework of the judicial cooperation instituted by Article 177, through which national courts and the Court of Justice, within their respective competences, contribute directly and reciprocally to the elaboration of a decision with the purpose of assuring the uniform application of Community law in the whole of the Member States.⁵⁵

Here we hark back to what was said in Chapter I about the basic concept of "jurisdiction sharing." As "jurisdiction" implies divisions based on legal rules, so "sharing" implies a flexibility sufficient to promote effective cooperation. A description of the techniques of jurisdiction sharing between Community and national courts can only attempt to isolate what firm jurisdictional divisions exist and to

⁵⁵ XI-10 Rec. at 1095.

indicate the factors which may contribute to the manner in which sharing takes place in particular instances.

There are, abstractly at least, certain firm jurisdictional principles which regulate the Community Court/national court relationship, e.g., that the Community Court interprets while national courts apply, that the Community Court can interpret only Community law, that referrals will not be dismissed on the basis of the irrelevance of the requested interpretation to the litigation in the national court. Yet, as we have seen, these principles are difficult to apply consistently while at the same time developing an effective cooperation. The manner in which the Community Court views its role varies from case to case.

A primary example of the variability of the Court's approach was discussed in Chapter IV where we noted the inconsistencies in the treatment of national law questions involved in Article 177 referrals and sought to illuminate those inconsistencies by reference to both the general and the specific political contexts within which the decisions were rendered.⁵⁶ An investigation of the use of the Article 177 jurisdiction in the development of Community competition policy as compared with the exercise of that same jurisdiction in the social security field may further serve to

⁵⁶ See Chapter IV supra, notes 131-151 and accompanying text.

illustrate the extremely complex set of variables that comes into play in this sharing process.

We have had occasion previously to mention the rather byzantine procedures by which competence to rule on the compatibility of agreements or practices with Articles 85 and 86 of the EEC Treaty are allocated between Community and national authorities.⁵⁷ These rules have to some degree discouraged national courts from dealing with competition problems.⁵⁸ However, despite early reluctance⁵⁹ national courts are handling these issues and occasionally making referrals to the Court of Justice for interpretations of the Community policy.

Requests for interpretations of Articles 85 and 86 place the positions of the Community Court and national courts in sharp relief, for in the competition area the "facts" are crucial. Whether agreements "prevent, restrict or distort competition" or whether there has been an "improper exploitation by one or more undertakings having a dominant position within the Community or a substantial part of it" are not questions which can easily be resolved in the abstract. Here we might expect that the Court of Justice would take a fairly

⁵⁷ See Chapter II, note 96.

⁵⁸ Buxbaum, Incomplete Federation: Jurisdiction Over Anti-trust Matters in the European Economic Community, 52 Calif. L. Rev. 56, 59-80 (1964).

⁵⁹ See discussion in Chapter V supra, at notes 56-59 and accompanying text.

particularistic approach to interpretation in the interest of assuring uniformity.

This sort of approach is, of course, the negative pregnant in the Bosch opinion's suggestion that a more direct response could not be given there because of the lack of adequate factual data.⁶⁰ Interestingly enough, this same language was relied upon by the plaintiff in the next interpretive referral concerning the competition rules,⁶¹ but for a quite different purpose. The argument made was, not that because adequate facts had been supplied the Court should give a specific answer, but that the provision of a full description of the factual context by the referring court would constrain the Court of Justice to apply rather than interpret the Treaty and therefore to operate outside its proper jurisdiction. The Court of Justice rejected this argument on the basis of its consistent refusal to dismiss requests for interpretation because of their form.⁶² The Community Court can always select from the data supplied the issues of interpretation which are within its competence.

Indeed, in the instant case, La Technique Minière (L.T.M.) v. Maschinenbau-Ulm (M.B.U.), the question for interpretation had been carefully drafted. The national court

⁶⁰ Note 16, supra.

⁶¹ La Technique Minière (LTM) v. Maschinenbau-Ulm (MBU), Case No. 56/65, XII-4 Rec. 337, 30 June 1966.

⁶² Id. at 357.

asked,

What interpretation should be given to Article 85(1) of the Rome Treaty and to the Community regulations enacted for its application in regard to a contract which has not been notified [to the Commission] and which grants a right of exclusive sale (1) which does not prohibit reexportation to other Member States of the grantor's merchandise, (2) which does not require that the grantor prohibit his concessionaires in other Member States from selling his products in the territory of the grantee in the contract, (3) which presents no obstacle to parallel importation by dealers and users in the state of the concessionaire through dealers or concessionaires in other Member States, and (4) which requires prior authorization by the grantor for the sale by the concessionaire of machines which might compete with the merchandise which is the subject of the contract.⁶³

The referring court has here framed its question so that a direct answer to it would involve only a decision of the effect of the competition rules on a particular "type" of contract, while at the same time the "type" described by the Paris court reflected the concrete situation before it. This technique is virtually identical to that we noted previously in certain of the recent referrals involving Regulation No. 3 on the Social Security of Migrant Workers, wherein the Motifs of the Court of Justice have, after some abstract exegesis, provided answers simply in the positive or the negative.⁶⁴ Yet in L.T.M. v. M.B.U., far from adopting an approach which tied the interpretation very closely to the facts, the Court gives a relatively abstract although detailed exposition of the criteria by which national courts

⁶³ Ibid.

⁶⁴ See cases cited at note 51, supra.

should judge whether the instant or any other agreement falls within the prohibition of Article 85(1). Why was the approach of the social security cases, as presaged by the Bosch case, not followed?

One answer might be that here, contrary to L.T.M.'s assertion, the Court did not think an adequate context had been provided. Although the national court's question adequately described the provisions of the contract, it did not describe how it, or contracts of its type, actually affected competition in the relevant market. There was extended argument, both written and oral, concerning whether accepted behavior under such contracts involved considerably more restrictive practices than appeared within the four corners of the agreement. The Court of Justice makes clear in its opinion, and has since reiterated,⁶⁵ that both the law of the contract and the objective facts of its operation should be considered in determining its effect on commerce between Member States and its effect on competition.

Should we then take this to mean that the provision of this further factual background would in subsequent competition cases produce more specific replies? Some support for such a view can be gleaned from Parke, Davis & Co. v. Centrafarm⁶⁶ in which the Court was willing to reply that on the basis of the facts supplied by the national court and

⁶⁵ Brasserie de Haecht S. A. v. Consort Wilkin-Janssen, Case No. 23/67, XIII-5 Rec. 525, 12 December 1967.

⁶⁶ Case No. 24/67, XIV-2 Rec. 81, 29 February 1968.

developed in the course of argument it did not consider Article 85(1) of the Treaty applicable. Although there had been some allusions to the contrary, the record indicated fairly clearly that only an attempt to protect a patent by an individual firm was involved and hence no agreement between enterprises, decisions of associations of enterprises or concerted practices within the meaning of Article 85. Yet the Court of Justice was careful to note that the final evaluation of the facts remained entirely within the competence of the national judge.⁶⁷ Moreover, the Community Court made no effort to tie its very limited interpretation of the potentially applicable provision, Article 86, to the facts presented in Parke-Davis. The national court was left complete freedom to determine whether the practices involved resulted in the existence and abuse of a dominant position in the Common Market.

In sum, the practice of the Community Court when rendering interpretations in the competition field seems to diverge significantly from its practice when interpreting the social security regulations, and for reasons not fully explainable on the basis of the type of questions asked or the amount of factual data supplied. A number of bases for this divergence may be suggested.

The most obvious difference between the two classes of cases is the subject matter. In the social security field

⁶⁷ Id. at 110.

the Court is dealing with a very specific set of rules about which little of real value to national courts can be said in the abstract. In the competition area, on the other hand, considerable explication can be made in terms of criteria for application, as L.T.M. v. M.B.U. illustrates, without tying the interpretation very closely to specific facts. Yet, this distinction is somewhat unsatisfying. Clearly the Court's development of the content of Articles 85 and 86 is more helpful to the national judge in solving his particular problem the more specific it becomes. If the Court of Justice feels justified in interpreting in terms of "types" of situations abstracted from the real context in Regulation No. 3 cases, why is it not so disposed when dealing with Articles 85 and 86?

I would suggest that the answer lies, at least in part, in pursuing this question of subject matter from a slightly different perspective. The contrast between the specificity of Regulation No. 3 and the generality of Articles 85 and 86 and even Regulation No. 17 reflects something more than a difference between a technical approach to technical subject matter and a general approach to a conceptually difficult area. A social security scheme becomes technical only after general political decisions have been made which allow the technical work to be done. Indeed the common commitment to a rationalization of social security benefits for migrant

workers antedates the EEC Treaty.⁶⁸ When basic policy commitments are clear, the Court can move with more assurance.

The same can hardly be said for competition policy. Latin and Germanic ideas of the degree to which competition should be fostered as a market regulator have a considerable history of divergence. There is still considerable disagreement over many questions, such as, the relative value to be given the rationalizing effects of exclusive distribution systems as against their market-dividing effects⁶⁹ or the proper approach toward mergers when the impact on both internal and external markets must be taken into account.⁷⁰ There is perhaps much to be said for allowing a period of experimentation through decentralized administration by national authorities in the hope of developing some sound policies through experience. This basic approach, as well as the political difficulty of providing a completely centralized

⁶⁸ See Kahn-Freund, Labor Law and Social Security in Stein & Nicholson, American Enterprise in the EEC, 297, 320-21 (1960).

⁶⁹ Indeed, in L.T.M. v. M.B.U. the Italian Government was still of the opinion that Article 85 did not apply to vertical agreements. XII-4 Rec. at 347.

See generally, discussion in Deringer, The Competition Law of the European Economic Community 45-46, 151-52 (1968).

⁷⁰ The Commission seems to have delayed taking a clear position on concentration policy by a preliminary determination that only Article 86 will be applicable to mergers. See Deringer, op. cit. supra note 69 at 38.

See also discussion in Kelleher, The Common Market Anti-Trust Laws: The First Ten Years, 12 Anti-Trust Bull. 1219, 1249-52 (1967).

administration,⁷¹ may underlie the preservation of the competence of national authorities in Regulation No. 17. Moreover, there is in the competition area the counterbalancing safeguard against harmfully divergent tendencies of the Commission's powers of enforcement and intervention.

Indeed, the position of the Commission may have an additional impact on the Community Court's approach to interpretation of the competition rules. One of the primary direct powers of the Commission over Community enterprises is its power to take decisions in application of the competition policy. These decisions are then reviewable by the Court of Justice in the exercise of its "administrative" jurisdiction. If the Court were to exercise a large measure of discretionary judgment with respect to particular cases under Article 177, it might put itself in the position of making decisions there of the same type that it is to judge on the basis of legality rather than opportunity in its role as administrative court. This dual role must certainly have been brought home to the Court of Justice in relation to L.T.M. v. M.B.U., for it was at the same time considering the Grundig-Consten⁷² case contesting Commission decisions applying Article 85.

This discussion, however conjectural, suggests that the provision of a technique for sharing jurisdiction between national judiciaries in Article 177 is not only a reflection

⁷¹ Bebr, Judicial Control of the European Communities 210 (1962).

⁷² Etablissements Consten S.A.R.L. v. Commission, Cases Nos. 56 & 58/64, XII-4 Rec. 429, 12 July 1966.

of the overall jurisdiction sharing scheme in the Community; it is a jurisdiction whose exercise is in some considerable degree influenced by an appreciation of what is appropriate in the context of that general scheme. Indeed, this is probably the only legitimate standard by which the consistency of the Community Court's practice under Article 177 can be judged. It is a standard which requires an investigation of the total context of a particular case in the widest possible sense and which recognizes that judicial jurisdiction sharing is an organic part of general jurisdiction-sharing procedures in the European Communities - a part which could not long survive if cut off from the vital forces at work in the whole organism.

CHAPTER VII: Concluding Comments: Frustration and Accomplishment

In some ways the description of the functions and functioning of the Court of Justice of the European Communities under Article 177 reads like a catalogue of frustrations. We begin by noting the "pluralism" which dominates any analysis of the political and economic bases of the Community. These divergent ideas work themselves out in a compromise institutional structure which contains not only a variety of organizational powers and relationships, but a considerable potential for shifts in authority and influence. Clearly oversight by a Court is required if legality is to be respected in such a system, and as we discovered the policing of this complex jurisdiction-sharing structure is the fundamental task of the Court of Justice. Yet the same factors which require judicial review based on principles of legality make the development of those principles extremely difficult.

Nor do the Court's obstacles in fulfilling its role end with the indeterminacy of the political base in respect of which any such constitutional reviewing function must be exercised or with complex allocations of competences and modes of action which diffuse responsibility and require that much law which is "Community" in substance be national in form. The Court of Justice is also a part of this jurisdiction-sharing system, and its competence as established by the Treaty places significant restrictions on its ability

to make decisive resolutions of constitutional issues and to implement those decisions when made.

To be sure the Court of Justice has a powerful administrative jurisdiction in relation to acts of Community institutions, but even here there are limitations on effective control which result from the rather severe interest requirements of Articles 173 and 175 in respect of individuals and the alternative "political" avenues for control available to Member States. When we turn to questions of the control of Member State action and the assurance of uniformity in the application of Community law, further weaknesses appear. The Court's jurisdiction extends to only a "declaration" of the non-fulfillment of treaty obligations. Of course, this is also broadly descriptive of the position of national judiciaries in respect of governmental acts, but the ability of the national court to withhold traditional in rem or in personam enforcement adds something to its political muscle. Since national authorities will never be looking to the Court of Justice for enforcement of its demands on private parties, that Court lacks this further opportunity for effective judicial review. Moreover, in state federations the position of the national government as the enforcing agency for the federal judiciary may be sufficiently powerful to coerce compliance with national policy by recalcitrant political subdivisions. An additional limiting factor on Community Court control over Member State action is the

reservation of access to this jurisdiction to parties who have strong political interest in avoiding direct clashes of this sort. Nor can individuals force the Commission to initiate proceedings through the procedures for control of the administration. It is in this area that Article 177's interpretive referral procedure was found to take on immense constitutional significance.

Yet, again the Court's powers are not great under Article 177 when compared with the importance of the issues with which it is expected to deal. It can act only at the behest of national courts. It interprets only "Community law" and that law only in its formal sense, that is, as embodied in the treaties and acts of Community institutions. Moreover, because it lacks jurisdiction under Article 177 to decide specific cases, the Court is to some extent deprived of that flexibility inherent in the ability of most constitutional courts to narrow the policy implications of their judgments by relating decision-making closely to the solution of a particular conflict.

Given these difficulties, the Court of Justice has made, it seems to me, substantial progress toward the establishment of a system of constitutional control appropriate to the Community structure. In summary, two somewhat contradictory patterns of development seem especially significant.

A. National Courts and Community Law: The Establishment of Basic Principle

In the context of the general EEC pattern of jurisdiction-sharing, which leaves concrete implementation of Community policy to national machinery, national courts take on a signal importance in the assurance of individual rights based on Community law. Through its interpretations under Article 177 the Court of Justice has extended and reoriented this position of the national judiciary in two rather fundamental ways. First, the Court has recognized the principle of effectiveness as a paramount interpretive guide in determining whether individual legal rights are created by Community law. As concerns the basic Treaty text, the van Gend & Loos and Lütticke decisions have significantly undermined the traditional "treaty contract" approach, and have called upon national courts to apply the Treaty as a directly effective basis for decision in large numbers of cases. Moreover, although the Article 189 definitions of the Community modes of action apparently place restrictions on this sort of development in relation to institutional acts, we have noted the logic of extending these interpretations to certain directives and decisions.

Second, the Court of Justice has firmly established the "separate legal order" idea and its concomitant "independent obligation" for national judicial organs. In some ways this is to turn weakness into strength. The Court of Justice cannot interpret national law - therefore it has treated all

claims of the irrelevance of Community law under national rules as irrelevant to the admissibility of an Article 177 referral. Moreover, because the Court does not see in "Lorsqu'une telle question est soulevée..." in Article 177(3) a reference to national criteria of relevance, the obligation to refer questions of Community law implies the independent impingement of Community law on national judiciaries. To be sure, national courts must decide questions of relevance in the first instance, but Costa makes clear their responsibility to appreciate such issues from a Community perspective.

In short, national courts are being required, to the extent that the Community Court can by hammering away at first principles so require them, to assume an identification with and a major role in the Community jurisdictional system. The role is inevitable; it is a basic presupposition of a predominately normative federal structure. The identification is necessary to the assurance of legality, and the Court of Justice leaves no doubt that it considers such identification a fundamental principle of the Community legal order.

B. Flexibility in the Exercise of Jurisdiction: The Question of Technique

Compared with the virtual dogmatism of the independent legal order principle, the variableness of the Community Court's approach to its role under Article 177 verges on anarchy. Questions need not be framed in any particular manner; they may be dissected or amalgamated in the process

of interpretation; answers may come as a 'yes' or a 'no' or in the form of relatively abstract criteria; instruction is never used in interpretive referrals, but there may be oral argument on the facts and data outside the submissions of the national court sometimes seeps in. Does all this contribute to substantive legality or to an appropriate development of the Community constitutional system?

I would suggest that it does. A substantial portion of the variation in techniques of cooperation with national courts seems clearly designed to facilitate that cooperation. In this category should certainly be included the lack of clear standards for national court submissions and the relatively specific answers that have sometimes been proffered. Of course, in addition to these instances we have noted other factors which seem influential, e.g., the level of commitment to common policy and occasionally specific political problems. Particularly where our explanations have been cast in political terms we may wonder whether the Court is fulfilling its role of ensuring the rule of law in the interpretation and application of the Treaty.

However, the development of a totally consistent practice or set of principles concerning the role of the Court under Article 177 is not in any way critical to the protection of private interests or to the maintenance of the Community institutional order. Indeed, to the extent that the variances in the Court's approach have tended to make its substantive decisions either more acceptable or more

meaningful to national courts, they may be furthering those goals. In this way the Court of Justice creates for itself some of the flexibility in approaching constitutional issues that most national constitutional courts develop through their power to manipulate the importance assigned to the factual elements of particular litigation. The basic aim of Article 177 is, after all, uniformity of law. There seems no reason why the Court of Justice should not consider the total context of each referral in order to appreciate how its action is likely to affect the ultimate realization of that end. All constitutional decision-making must rely explicitly or implicitly upon a political foundation. At the very least a choice must be made to reinforce or to sanction particular directions in political development, and that choice cannot be articulated by the Court or by students of the Court in terms of wholly neutral principles. So long as substantive non-uniformity is not introduced, flexibility of interpretive technique seems appropriate under the jurisdiction-sharing system as we have described it.

For this is the general pattern: firmness coupled with flexibility; jurisdiction that is shared. A system structured in paradox when viewed as a whole; but somehow on a particular day in respect of a particular problem it is a system which operates, which decides, which is viable - perhaps vibrant.

BIBLIOGRAPHY

A. DOCUMENTS, COMMUNIQUEs, BULLETINS, EUROPEAN COMMUNITIES' PUBLICATIONS

Action committee for the United States of Europe, Joint Declaration, 11th. Sess., Bonn, June 1, 1964.

Agence Internationale d'information pour la presse, Europe, Bulletins Quotidiens et Supplements Edites.

Agreement establishing an association between the European Economic Community and Greece and annexed documents. (1961).

Agreement establishing an Association between the European Economic Community and Nigeria and annexed documents. (1966).

Agreement establishing an Association between the European Economic Community and Turkey and annexed documents. (1963).

Bohy, Rapport fait au nom de la Commission Speciale, Chambre des Représentants (Belge). Sess. 1956-57.

Chambre des Deputes du Grand-Duché de Luxembourg, Lois du 30 Novembre 1957, Marché Commun, EURATOM Institutions Commun, Documents et Discussions parlementaires. (1957).

Common Market Law Reports (1963-present).

Convention of Association between the European Economic Community and the African and Malagasy States associated with that Community and annexed documents. (1963).

Council of Europe, Consultative Assembly, Débats. (1955).

Court of Justice of the European Communities, Recueil de la Jurisprudence de la Cour (Vols. I-XIV, 1954-1968).

Court of Justice of the European Communities, Legal Commentary on European Integration (1966) (bibliography). Supplement (1967).

Court of Justice of the European Communities, Bibliography of European Case Law (1966). Supplement (1967).

ECSC, High Authority Annual Reports, 1-14. (1952-1966).

European Communities, Commission, General Report (annual). (1967-present).

European Communities Information Service, European Community (bi-monthly bulletin).

European Communities Information Service, Community Topics (irregular series).

European Communities, Journal Officiel des Communautés Européennes. (1958-present).

EEC, Commission, Annual Reports 1-9. (1958-1966).

EEC, Commission, Bulletin of the European Economic Community (monthly).

EEC, Monetary Committee, Annual Reports (1959-present).

European Parliament Debates.

European Parliament Documents de Seance.

European Parliament European Documentation.

European Parliament, Rapport sur le onzième rapport général sur l'activité de la Communauté européenne du charbon et de l'acier. (June 18, 1963).

Exposé des Motifs, Traité relatif a l'institution et aux statuts d'une Cour de Justice Benelux. (1964).

Les Consequences d'ordre interne de la participation de la Belgique aux Organizations internationals. (1964).

Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Comité intergouvernemental créé par la Conference de Messine. (1956).

Rapport fait au nom de la Commission des affaires étrangères sur le projet de loi (No. 4677), Assemblée Nationale (France), troisième legislature, session ordinaire de 1956-57.

Trade Agreement between the European Economic Community and the Imperial Government of Iran. (1963).

Trade Agreement between the European Economic Community and the State of Israel. (1964).

Travaux Préparatoires, Traité instituant le CEE. (Cour de Justice, Luxembourg, 1962).

Treaty Establishing a single Council and a single Commission of the European Communities. (1965).

Treaty Establishing the European Atomic Energy Community and connected documents. (1957).

Treaty Establishing the European Coal and Steel Community and connected documents. (1950).

Treaty Establishing the European Economic Community and connected documents. (1957).

B. MONOGRAPHS, COLLOQUIA, COLLECTIONS OF ESSAYS

Alexander, Questions et reponses préjudicielles dans la procédure de la Cour de Justice des Communautés Européennes, Publications de l'Institut d'Études Européennes, No. 8 (1964).

Anand, Compulsory Jurisdiction of the International Court of Justice (1961).

Auby et Drago, Traité de Contentieux Administratif (1962).

Bebr, Judicial Control of the European Communities (1962).

Benoit, Europe at Sixes and Sevens (1961).

Bolingbroke, The Works of Lord Bolingbroke (1841).

Bowie and Friedrich, Studies in Federalism (1954).

Campbell and Thompson, Common Market Law (1962).

Camps, Britain and the European Community (1964).

Camps, The Free Trade Area Negotiations (P.E.P. Occasional Paper No. 2, 1959).

Cardis, Fédéralisme et Intégration Européenne (1964).

Cartou, Le Marché Commun et Le Droit Public (1959).

Catalano, Manuel de droit des communautés européennes (1962).

Chevallier, Commentaire de l'article 177 du Traité CEE a l'usage des juges et des justiciables français (Thèse, Paris, 1964).

Colloque sur la Fusion des Communautés Européennes (Liège, 1966).

Deringer, The Competition Law of the European Economic Community (1968).

Diebold, The Schuman Plan (1959).

Droit Communautaire et Droit National, Colloque, Les Semaines de Bruges (1965).

Etzioni, European Integration and Perspectives on Sovereignty, The Atlantic Community Question (1964).

Fachire, The Permanent Court of International Justice (1932).

Feld, The Court of the European Communities (1964).

Foda, The Projected Arab Court of Justice (1957).

Frankfurter and Landis, The Business of the Supreme Court (1928).

Freidmann, The Changing Structure of International Law (1964).

La Fusion des Communautés Européennes, Colloque (Liège, 1965).

Gaudet, *Communita Economica Europa* (1960).

Graupner, The Rules of Competition in the European Economic Community (1965).

Haas, *Uniting of Europe* (1958).

Henderson, *The Genesis of the Common Market* (1962).

Holmes, *Law and the Court, Collected Legal Papers* (1920).

Hudson, *International Tribunals* (1944).

Hudson, *The Permanent Court of International Justice* (1943).

Jaffe, *Administrative Law* (1954).

Jenks, *The Common Law of Mankind* (1958).

Jenks, *The Proper Law of International Organizations* (1962).

Jenks, The Prospects for International Adjudication (1964).

Kapp, The Merger of the Executives of the European Communities (1964).

Kelly and Harbison, The American Constitution (3rd. Ed. 1963).

Kelsen, Law and Peace (1942).

Korac, Le pouvoir réglementaire de la Communauté Européenne du Charbon et de l'Acier (1964).

Lauterpacht, The Function of Law in the International Community (1933).

Levy, L'Executive Européen, Thèse, Strasbourg (1959).

Ljubisavljevic, Les Problèmes de la Ponderation dans les Institutions Européennes (1959).

McIlwain, Constitutionalism (1958).

Mackinnon, Comparative Federalism (1965).

Mason, The European Coal and Steel Community (1955).

Mathijssin, Le droit de la Communauté Européenne du Charbon et de l'Acier: une étude des sources (1958).

Meade, Theory of Customs Unions (1955).

Mill, Representative Government (Ed. R. B. McCallum, 1947).

Mitchell, Constitutional Law (2nd Ed., 1968).

Northrop, European Union and United States Foreign Policy (1954).

Nussbaum, A Concise History of the Law of Nations (1954).

Plischke, (Ed.), Systems of Integrating the International Community (1964).

Port, Administrative Law (1929).

Prieur, La Communauté Européenne du Charbon et de l'Acier (1962).

Probleme des Europäischen Rechts: Festschrift für Walter Hallstein (1966).

Pryce, The Political Future of the European Community (1962).

Reuter, International Institutions (1958).

Reuter, La Communauté Européenne du Charbon et de l'Acier (1953).

Robertson, European Institutions (2nd ed. 1966).

Scelle, Manuel de Droit International Public (1948).

Scheingold, The Rule of Law in European Integration (1965).

Schmitt, The Path to European Union (1962).

Schubert, Quantitative Analysis of Judicial Behavior (1959).

Schuman, Pour l'Europe (1963).

Schwartz, French Administrative Law and the Common Law World (1954).

Starke, Introduction to International Law (5th ed. 1963).

Stein & Nicholson, American Enterprise in the European Economic Community, 2 Vols. (1960).

Stolle, Les Juridictions Internationales et le Droit Interne (1962).

Valentine, Court of Justice of the ECSC (1955).

Valentine, The Court of Justice of the European Communities, 2 Vols. (1965).

deValck, La Signification de l'Integration Européenne pour la Développement du Droit International Moderne (1962).

Wade, Administrative Law (1961).

Wade and Phillips, Constitutional Law (6th ed. 1960).

Wagner, The Federal States and their Judiciary (1959).

Waline, Traité Élémentaire de Droit Administratif (6th ed. 1952).

Wheare, Federal Government (1953).

Yearbook of International Organizations (1962-63).

Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften, Colloque (1965).

C. ARTICLES

Alexander, Questions Préjudicielles: L'application récente de l'article 177 CEE par la Cour de Justice et par les juridictions nationales, [1965] Cahiers de droit Européen 47.

Amphaux, Note, [1965] Cahiers de droit Européen 59.

Balladere, Note, Zeitschrift für Ausländisches Öffentliches und Volkesrecht 1963. No. 3, p. 473.

Batailler, Le juge interne et le droit communautaire, [1963] Annuaire Français de droit international 735.

Bebr, The Relationship of European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis, 58 Colum. L. Rev. 767 (1958).

Bertram, Decision Making in the EEC: The Management Committee Procedure, 5 C.M.L.Rev. 246 (1967-68).

Bogaert, Le caractere juridique de la cour de Justice, in Problems de droit des gens, Melanges offerts a Henri Rolin (1964).

Bonn, Les Problèmes juridico - linguistiques, [1964] Revue Général de droit International Public 768.

Buxbaum, Incomplete Federation: Jurisdiction over Anti-Trust Matters in the European Economic Community, 52 Calif. L. Rev. 56 (1964).

Catalano, Portées des Traités...et limits de pouvoirs souverains des états membres, Le Droit et les affaires, No. 49, 23 November 1964; Les Documents de la Quinzaine, No. 86, p. 1-8.

Chevallier, De quelques problèmes soulevés par l'explication du droit Communautaire en droit interne, [1964] Revue du Marché Commun, 489.

Chevallier, La Cour de Justice des Communautés Européennes, [1965] Revue Trimestrielle de Droit Européen, 260.

Chevallier, Le droit des communautés européennes et les juridictions français, [1962] Revue de droit public 646.

Chevallier, Method and Reasoning of the European Court in its Interpretation of Community Law, 2 C.M.L.Rev. 21 (1964).

Chevallier, Note, 3 C.M.L.Rev. 100 (1965).

Colliard, L'obscur clarté de l'article 37 du Traité de Communauté économique européenne, [1964] Dalloz Chron. xxxvii, 263.

Dehousse, Du caractère essentiel de l'organe juridictionnel à pouvoir constitutionnaire dans toute structure fédérale et application du principe à la Communauté Économique Européenne, [1965] Annuaire de la Faculté de Droit de Liège, 304.

Desmedt, Les Deux Directives du Conseil de la CEE concernant la police des étrangers, [1966] Cahiers de droit européen 55.

Donner, La justice, facteur d'unité et d'égalité du droit, [1962] Journal des Tribunaux 649.

Donner, La justice: élément d'intégration, Bestuurswetenschappen, No. 3, mei 1963, blz. 125.

Duclas, L'Européen: exploration d'une catégorie juridique naissante, [1961] Revue Général de Droit International Public 41.

Dumon, Conflits entre les normes résultant des traités ayant institué les Communautés européennes et celles de droit nationaux des états membres, 17 Revue International de Droit Comparé 21 (1965).

Dumon, La Cour de Justice du Communautés Européennes et les Juridictions des États Membres, 14 Revue International de droit comparé, 369 (1962).

Fitzmaurice, The Law and Procedure of the International Court of Justice, 33 British Yearbook of International Law 208 (1957).

Forrester, The Nature of a 'Federal Question', 16 Tul. L. Rev. 362 (1942).

Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3 (1948).

Freidmann, The uses of 'General Principles' in the Development of International Law, 57 British Yearbook of International Law 279 (1963).

Friendly, "The Historic Basis of Diversity Jurisdiction", 41 Harv. L. Rev. 483 (1928).

Funke, De l'histoire de l'article 177 du traité instituant la C.E.E. et des exposés des motifs gouvernementaux a son sujet, 13 Sociale-Economische Wetgeving 516 (1965).

Gaudet, Exposé devant la Commission Juridique, [1965] Revue Trimestrielle de Droit Européen, 198.

Gaudet, Incidences des Communautés européennes sur le droit interne des Etats Membres, Le Droit et les Affaires, Les Documents de la Quinzaine No. 35, 16 Sept. 1963, p. 1.

Gaudet, The Challenge of the Changing Institutions, 3 C.M.L.Rev. 143 (1965).

Gaudet, The Legal Systems of the European Community, in Proceedings of the 1960 Institute on Legal Aspects of the European Community (1960).

Gazier, La Cour européenne est-elle 'européenne'?, Le 20^e siècle fédéraliste, No. 31, 8 April 1960, p. 6.

Gordon, The World Court and the Interpretation of Constitutive Treaties, 59 Am. J. Int. L. 794 (1965).

Grisoli, Approximation of Laws, 26 Law and Contemp. Prob. 418 (1961).

Hahn, Constitutional Limitations in the Law of the European Organizations, [1963] 1 Recueil des Cours 195 (1964).

Hallstein, Intervention dans le débat juridique sur le rapport de Dehousse, [1965] Revue Trimestrielle du Droit Européen 247.

Hay, Comment, 12 Am. J. Comp. L. 404 (1963).

Hay, Federal Jurisdiction of the Common Market Court, 12 Am. J. Comp. L. 21 (1963).

Heidelberg, Parliamentary Control and Political Groups on the Three European Regional Communities, 26 Law and Contemp. Prob. 430 (1961).

Heurté, Le Recours sur Renvoi des Tribunaux Judiciaires, [1958] Actualité Juridique 111.

Heuvel, Civil Law Consequences of Violation of the Anti-Trust Provisions of the Rome Treaty, 12 Am. J. Comp. L. 172 (1963).

Keeton, The Zollverein and the Common Market, [1963] Cur. Leg. Prob. 1.

Kelleher, The Common Market Anti-Trust Laws: The First Ten Years, 12 Anti-Trust Bull. 1219 (1967).

Lagrange, La Cour de Justice de la CECA, [1954] Revue du droit publique 417.

Lagrange, Les pouvoirs de la haute autorité et l'application du traité de Paris, 77 Revue du droit public 40 (1961).

Lagrange, Les Problèmes juridiques et économiques du Marché Commun, [1960] Librairies Techniques 43.

Lagrange, L'ordre juridique de la CECA, 74 Revue du Droit Public 362 (1958).

Lagrange, The Non-Contractual Liability of the Community in the ECSC and in the EEC, 3 C.M.L.Rev. 10 (1965).

Lagrange, Le pouvoir de décision dans les communautés européennes, 3 Revue Trim. de Droit Européen 1, (1967).

Lagrange, The Role of the Court of Justice of the European Communities as Seen Through Its Case Law, 26 Law and Contemp. Prob. 400 (1961).

Laubadère, Le contentieux de l'interprétation du traité de Rome, [1964] Actualité Juridique 440.

Laubadère, Note, [1964] Actualité Juridique 440.

Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 British Yearbook of International Law, 48 (1949).

Lecourt, Chances et Malchances de l'harmonisation, Recueil Dalloz, No. 43, 18 December 1963, p. 273.

Lecourt, Rôle de la Cour de Justice dans le développement de l'Europe, [1963] Revue de Marché Commun, 273.

Lenhoff, Jurisdictional Relationship Between the Court of the European Communities and the Courts of the Member States, 12 Buff. L. Rev. 296 (1963).

Liebhalz, The Federal Constitutional Court of Western Germany, in Legal Essays - A Tribute to Fred Castberg (1963).

Lindberg, Decision Making and Integration in the European Community, XIX International Organizations 56 (1965).

London, 'Federal Question' Jurisdiction - A Snare and a Delusion, 57 Mich. L. Rev. 835 (1959).

Lyon-Caen, La jurisprudence sociale de la Cour de Justice des Communautés en 1964, [1965] Rev. Trim. de. Dr. Eur. 84.

Maas, The Administrative Commission for the Social Security of Migrant Workers: An Institutional Curiosity, 4 C.M.L.Rev. 51 (1966).

McMahon, The Court of the European Communities, Judicial Interpretation and International Organization, 37 British Yearbook of International Law, 320 (1961).

McWhinney, Classical federalism and supra-national integration as treaty-based association, American Society of International Law, Annual Meeting, Proceedings, p. 241. (Washington, 1963).

Monaco, Les Principes d'interpretation suivis par la Cour de Justice des Communautés Européennes, in Problèmes de droit des gens, Mélanges offerts à Henri Rolin (1964).

Monaco, Regle de droit communautaire et regle de droit interne, in Festschrift für Otto Riese (1964).

Morelli, La Cour des Communautés européennes en tant que juge interne, 19 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, 269 (1958).

Nadelman, Assimilation of Laws, [1964] Am. J. Int'l. L. 724.

Olivier, Aspects juridiques de l'adaptation du Traité C.E.C.A. a la crise charbonniere, [1967] Cahiers de droit européen 163.

Ophuls, La loi allemande portant ratification du Traité de la CEE est-elle, en partie, anti-constitutionnelle, Le Droit et les Affaires, No. 41, 6 July 1964, Les Documents de la Quinzaine, No. 75, p. 1-8.

Ophuls, Les Réglements et les Directives dans les Traités de Rome, [1966] Cahiers de Droit Européen 3.

Opperman, La clause le sauvegarde de l'article 115 de Traité de la CEE, [1965] Revue du Marché Commun, 376.

Opsahl, An "International Constitutional Law"?, 10 Int'l. & Comp. L. Q. 760 (1961).

Opsahl, National Courts and the Community Court under Article 177 of the EEC Treaty, in Legal Essays - A Tribute to Fred Castberg (1963).

Patijn, Permanent Representatives and "Chefs de Cabinet", [1967] Common Market, No. 11, p. 281.

Pepy, Les Questiones préjudicielles dans les traités de Paris et de Rome et la jurisprudence de la Cour de Justice de les Communautés Européennes, [1966] Cahiers de droit européen 55.

Precigout, La Sanction des infractions aux règlements de la C.E.E., 5 Revue du Marché Commun, 142 (1962).

Reuter, Juridical and Institutional Aspects of the European Regional Communities, 26 Law & Contemp. Prob., 381 (1961).

Reuter, La Recours de la Cour de Justice à des principes generaux de droit, in Problèmes de droit des gens, Mélanges offerts à Henri Rolin (1964).

Riesenfeld, The Decisions of the Court of Justice of the European Communities 1961-1963, [1965] Am. J. Int'l. L. 325.

Robertson, Legal Problems of European Integration, 91 Recueil des Cours, 105 (1957).

Rodiere, L'harmonisation des legislations européennes dans le cadre de la CEE, 1 Revue Trimestrielle de Droit Européen, 336 (1965).

Ropers, Des Conflits Entre la Cour de Justice des Communautés et les juridictions nationales, [1962] Juriclasseur Periodique 1709.

Rosentiel, Reflections on the Notions of "Supranationality", 2 J. Com. Mkt. Stud., 127 (1962).

Rueff, Le Concept de Marché Commun selon law jurisprudence de la Cour, in Festschrift für Otto Riese (1964).

Ryziger, Société anonyme La Technique Miniere v. Société Maschinenbau Ulm GmbH, (Note) [1965] Cahiers du droit européen 250.

Saclé, L'Association dans le Traité de Rome, 4 Rev. Trim. de Dr. Eur. 1 (1968).

Samkalden and Druker, Legal Problems Relating to Article 86 of the Rome Treaty, 3 C.M.L.Rev. 158 (1965).

Saratier, Le Marché Commun au regard du droit international privé, 48 Revue Critique de Droit International Privé, 237 (1959).

Salmon, L'application en France des directives de la CEE, [1965] Revue du Marché Commun, 105.

Schwarzenberger, Federalism and Supranationality in the European Communities, 16 Cur. Leg. Prob. 17 (1963).

Sidjonski, Decisions clos et decisions ouverts, [1965] Revue Française de Science Politique, 251.

Stein, Assimilation of National Laws as a Function of European Integration, 58 Am. J. Int'l L. 1 (1964).

Stein, Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case, 63 Mich. L. Rev., 491 (1965).

Tallon, Le droit communautaire: Réalités et illusions, [1966] Cahiers de droit européen, 571.

Union Internationale des Avocats, La procédure selon l'article 177 du traité instituant la Communauté Economique Européenne, 13^e jaargong No. 7-8 Sociaal-Economische Wetgeving (1965).

Viole, Questions posées par l'interprétation du traité du 25 Mars 1957 instituant la C.E.E. a propos de la nationalisation de l'électricité en Italie, [1965] Revue Trimestrielle du droit européen, 309.

Waelbroeck, The Application of EEC Law by National Courts, 19 Stan. L. Rev. 1248 (1967).

Waelbroeck, Contribution a l'étude de la nature juridique des Communautés Européennes, in Problèmes de droit des gens, Mélanges offerts à Henri Rolin (1964).

Waelbroeck, Le juge belge devant le droit international et le droit communautaire, [1965] Revue Belge de Droit International, 348.

Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev., 49 (1923).

Wenner, L'Application du droit de la Communauté Européenne Economique, Le Droit et les Affaires No. 14, 13 May 1963, Les Documents de la Quinzaine, No. 26, p. 1-3.

Wesner, Les Conflits de Juridictions dans le Cadre du Marché Commun, in La Revue critique de droit international privé (1959-61).

Wiebringhaus, Le droit européen face au problème du statut des accords internationaux dans les structures fédératives, [1961] Rivista di diritto europeo, 367.

Willemetz, Role des Juridictions Nationales dans l'interpretation du Traité de Rome, [1958-59] Droit Européen, 136.

Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L. Rev. 502 (1964).

Wolters, Les recours en annulation devant le cour de justice des communautés européennes, 37 Revue de droit international et de droit comparé, 165 (1960).

Comment. Abstention and Certification in Diversity Suits: 'Perfection of Means and Confusion of Goals', 73 Yale L. J. 850 (1964).